(4)

No. 91-468

IN THE

# Supreme Court of the United States

October Term 1991

CHABAD-LUBAVITCH OF VERMONT,
RABBI YITZCHOK RASKIN,
*Petitioners,*

v.

CITY OF BURLINGTON, VERMONT, BOARD OF PARKS AND RECREATION COMMISSION,
*Respondents.*

and

AMERICAN CIVIL LIBERTIES FOUNDATION OF VERMONT, INC., MARK A. KAPLAN, ESQ., REVEREND ROBERT E. SENGHAS,
*Intervenor-Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITIONERS' SUPPLEMENTAL MEMORANDUM

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## PETITIONERS' SUPPLEMENTAL MEMORANDUM

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Pursuant to Rule 15.7 of the Rules of this Court, petitioners hereby submit this Supplemental Memorandum to advise the Court of two recent decisions that have been issued by a panel of the United States Court of Appeals for the Sixth Circuit and by the United States Court of Appeals for the Seventh Circuit *en banc* with regard to the single question presented by our petition: Whether the display of a privately sponsored Chanukah menorah in a city park that is a traditional public forum,

where private organizations have always been allowed to erect displays and conduct religious programs, violates the Establishment Clause because the park is "linked to the seat of municipal government."

(1) On April 21, 1992, a panel of the Sixth Circuit, by a 2-to-1 vote, issued a decision striking down the display of a Chanukah menorah sponsored by Chabad House of Western Michigan in the central public forum of Grand Rapids, Michigan. That decision effectively reversed the ruling that had been issued by another panel of the same Court of Appeals on a stay application (922 F.2d 303), in which a majority of that panel held that Chabad had a First Amendment right to place its privately sponsored religious symbol in a public forum, even if that location is associated with municipal government. The new decision of the Sixth Circuit appears as Appendix I to this Memorandum.

A petition for rehearing and rehearing *en banc* was filed with the United States Court of Appeals for the Sixth Circuit by Chabad House of Western Michigan on May 1, 1992. A similar petition was filed by the City of Grand Rapids on May 5, 1992. The Sixth Circuit has just called for a response by the appellees to Chabad's rehearing petition.

(2) On May 7, 1992, the Seventh Circuit issued its *en banc* ruling in *Doe v. Small,* a case which involved a private display in a public forum of religious paintings. A copy of that decision appears as Appendix II to this Memorandum. In that decision, the court held that the First Amendment requires that "public forums must be open to religious speech," and that no governmental endorsement of religion is created by the "mere presence of religious symbols in a public forum." Slip Opinion, pp. 91-96a, *infra.*

(3) The decisions of the Sixth and Seventh Circuits demon-

strate that there is substantial disagreement among the Circuits over the issue decided in this case by the United States Court of Appeals for the Second Circuit. This petition has been pending since September 1991. We surmise from the pendency of the petition that it is being held for the decision in *Lee v. Weisman*, No. 90-1014. The issue in *Lee v. Weisman*, however, involves the proper test to be applied under the Establishment Clause, not the issue of a private party's right to engage in religious speech in a public forum. That decision will not resolve the distinct and important constitutional issue that is presented by this case, by the conflicting decision of the Seventh Circuit sitting *en banc*, and by the conflicting decisions of the Sixth Circuit.

Accordingly, we urge the Court to grant the pending writ of certiorari in this case. If the petition is granted promptly, the case may be briefed and argued early in the 1992 Term of Court. This will give the Court ample time to consider the various constitutional considerations and to issue a fully considered opinion.

Respectfully submitted,

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May 1992

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

# APPENDIX I

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 24

Nos. 90-2337; 91-1391/1448

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

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AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; BENJAMIN BAUM; PHYLLIS BALL; WALTER BERGMAN; JOHN CHARLES BEARDEN; GILBERT R. DAVIS; and JAMES T. WEAVER,
*Plaintiffs-Appellees,*

*v.*

CITY OF GRAND RAPIDS,
*Defendant-Appellant* (91-1448),
CHABAD HOUSE OF WESTERN MICHIGAN, INC.,
*Intervenor-Appellant*
(90-2337/91-1391).

} ON APPEAL from the United States District Court for the Western District of Michigan

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Decided and Filed April 21, 1992

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Before: KENNEDY and BOGGS, Circuit Judges; and LIVELY, Senior Circuit Judge.

LIVELY, Senior Circuit Judge, delivered the opinion of the court. KENNEDY, Circuit Judge (pp. 31-34), delivered a separate concurring opinion. BOGGS, Circuit Judge (pp. 35-77), delivered a separate dissenting opinion.

LIVELY, Senior Circuit Judge. This consolidated appeal involves the interaction between the Establishment and Free Speech Clauses of the First Amendment. The controversy arose when a private group applied for a permit to erect a symbol of its religious faith on a public square that is the site of a number of core government operations buildings. Americans United for Separation of Church and State and several private citizens (the plaintiffs) sued for an injunction to prevent the city from issuing the permit. After proceedings described later in this opinion, the district court granted a permanent injunction prohibiting the City from issuing the permit. Following briefing and oral argument, we stayed the injunctive order and took the case under submission. We now lift that stay and affirm the judgment of the district court.

I.

A.

The essential facts are undisputed.

From 1984 to 1989, the City of Grand Rapids (the City) granted a permit to Chabad House of Western Michigan, Inc. (Chabad House), a private corporation, to display a twenty-foot steel menorah on Calder Plaza in celebration of the Jewish holiday of Chanukah. The menorah was purchased and is maintained solely with private funds. The City of Grand Rapids has no role in erecting, maintaining, or storing the menorah. The only monetary cost the City bears is electricity, and all parties agree that the permit fee likely offsets the cost of the electricity.

On both sides of the menorah is a sign, measuring two feet by three feet, illuminated at night, which proclaims:

> Happy Chanukah to All
> This Menorah display has been erected by Chabad House, a private organization. Its presence does not constitute an endorsement by the City of Grand Rapids of the organization or the display.

For the first five years of the display, only one sign accompanied the menorah. Beginning in 1989, however, the City required Chabad House to display visible signs on either side of the display.

During each night of the eight day Chanukah festival, Chabad House conducts a candlelighting service at the menorah display, typically lasting less than one hour. Other than this ceremony, the menorah is left unattended. No other Christmas or holiday decorations accompany the menorah display on the plaza because the City has received no other requests for permits during that season.

Calder Plaza is located in the center of downtown Grand Rapids, and is admittedly the principal public plaza in the City. Located on the four and a half acre plaza are the Kent County Building, Grand Rapids City Hall, three flagpoles flying the flags of the United States, Kent County, and the City of Grand Rapids, and a large sculpture by Alexander Calder. A likeness of the sculpture serves as the symbol of Grand Rapids. Across Monroe Street, to the west of the plaza, sits the police station and the Hall of Justice. Situated to the north of the plaza is the Federal Building. To the east, on the other side of Ottawa Avenue, are the State of Michigan Office Building, the Probate Court Building, the Frey Building, and the National Bank of Detroit Building, the latter two of which are private office buildings. Two other private buildings border Calder Plaza to the south and southwest.

The City filed exhibits with its brief in the district court consisting of a plat that shows the location of the menorah

on the plaza in relation to the various government buildings and several photographs of the menorah in place. We have reproduced two of these exhibits as an appendix to this opinion.

The plat, which is drawn to scale, discloses that the menorah stood 162 feet due east of the County Building and 256 feet southeast of the City Building. It stood approximately 270 feet south of the Federal Building and 230 feet southwest of the County Probate Court Building, and 330 feet southwest of the State Office Building. Additionally, the menorah is 150 feet from the Calder sculpture "La Grand Vitesse," and is adjacent to the three flagpoles.

Since the plaza was opened in 1969, the City has treated it as a traditional public forum, allowing all forms of speech and assemblage. In the past several years, activities occurring on the plaza include a Right to Life rally, a Hunger Walk by the Grand Rapids Center for Ecumenism, an AIDS candlelight march, an Italian festival (including a Catholic Mass), an Arts Festival, and a motorcycle helmet law protest. City records indicated that no group has ever been denied permission to use Calder Plaza.

Several organizations have erected temporary structures on the plaza for a number of days. The Arts Festival and the Italian Fair left booths and exhibit areas unattended overnight. Recently, yellow ribbons were wrapped around the Calder sculpture to show support for the troops during the war in the Persian Gulf.

B.

When Chabad House applied for a permit in November 1990, the district court granted the plaintiffs' motion for a preliminary injunction following a hearing. When it appeared that the City might not appeal and that the district court would not reach its motion to intervene until the eight-day religious holiday Chanukah was over,

Chabad House filed a notice of appeal from the order granting the injunction and sought a stay. A panel of this court granted intervention as of right and granted a stay of the district court injunction, pending appeal. *Americans United for Separation of Church and State v. City of Grand Rapids* (*Grand Rapids I*), 922 F.2d 303 (6th Cir. 1990).

The panel opinion in *Grand Rapids I* emphasized that the emergency motion was heard without the benefit of either a written opinion by the district judge or a transcript of the district court hearing and oral opinion. *Id.* at 305. Following entry of this court's stay, the case returned to the district court, where it was fully briefed and argued. On March 21, 1991, District Judge Enslen granted a permanent injunction against the City, using a rationale similar to that in his oral opinion granting the temporary injunction. Finding that recent cases did not alter his original decision, Judge Enslen held that "prohibiting the display of unattended solitary religious symbols would not violate the requirements that content-based exclusions serve a compelling state interest and be narrowly drawn." Chabad House and the City of Grand Rapids filed timely notices of appeal. The appeals presented a single issue and have been consolidated for hearing and disposition.

## II.

In recent years the Supreme Court has decided cases involving claimed Establishment Clause violations consisting of religious displays in government-owned public areas and religious meetings in public schools and universities. The parties disagree as to the significance of these decisions as applied to the facts of the present cases.

### A.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court held that the City of Pawtucket, R.I., did not violate the Establishment Clause by including a city-owned creche or

nativity scene, in a Christmas holiday display in a privately owned park in the heart of the city. *Id.* at 671, 687. The display included "a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads 'SEASONS GREETINGS,' and the creche at issue here." *Id.* at 671. The city paid for the initial cost of purchasing the creche, and continued to pay for its maintenance.

A majority of the Court held the display did not violate the Establishment Clause. The inclusion of a single religious symbol, the creche, did not "taint" the entire holiday display, and create a constitutional infirmity. *Id.* at 686. Justice O'Connor concurred in the judgment, but wrote separately to offer her "endorsement of religion" standard:

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

*Id.* at 692. The majority of the Supreme Court adopted the endorsement standard in *County of Allegheny v. ACLU of Greater Pittsburgh*, 492 U.S. 573, 597 (1989), but agreed on little else. That case involved two annual holiday displays in Pittsburgh. The first consisted of a creche display inside the courthouse, sponsored each year by a Roman Catholic church. The other involved an elaborate holiday display outside the City-County Building. This second display featured a 45-foot Christmas tree, fully decorated and lighted, and an 18-foot tall menorah to commemorate Chanukah. The Court came to different conclusions respecting the two displays. The creche was a visual representation of the New Testament account of the birth of Jesus. It contained a

manger and included figures representing the baby Jesus, Mary and Joseph, farm animals, shepherds and wise men. It was located on the "Grand Staircase" of the courthouse from November 26 to January 9. The creche bore a plaque stating: "This Display Donated by the Holy Name Society." *Id.* at 580. A majority of the Court held that this display inside the courthouse violated the Establishment Clause. The Court noted that "unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message." *Id.* at 598. Because the creche was situated on the most prominent staircase in the courthouse, no passerby could view it without receiving "an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message." *Id.* at 600. The disclaimer sign identifying the sponsor does not change this conclusion, wrote Justice Blackmun. *Id.* The Court noted that the staircase was not a traditional public forum. *Id.* at 600 n. 50.

The Court majority noted that displaying the menorah in front of the City-County Building presented a "closer constitutional question," *id.* at 613, but ultimately concluded that the display was permissible. Unlike the creche in *Lynch*, which was owned by the City of Pawtucket, neither Allegheny County nor Pittsburgh owned the creche or menorah. They were privately owned. The Court was impressed by the fact that the menorah was surrounded by "a Christmas tree and a sign saluting liberty." *Id.* at 614. The Court believed the tree to be a secular symbol, and the sign proclaiming liberty to "diminish[ ] the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism." *Id.* at 619. Therefore, the menorah display did not endorse religion in such a way as to violate the three-part test first adopted in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Justice Kennedy dissented from the creche ruling, joined by Chief Justice Rehnquist and Justices White and Scalia. The dissenters concluded that the majority misapplied the Establishment Clause and required governmental bodies to be hostile rather than neutral toward religion. The

majority's consideration of secular decorations, wrote Justice Kennedy, "threatens to trivialize constitutional adjudication." *Id.* at 674. Justices Brennan, Marshall and Stevens dissented from the menorah ruling, concluding that "the answer as to the first display [the creche] supplied the answer to the second [the menorah]." *Id.* at 637.

When the City of Pittsburgh subsequently refused to erect the display, including the menorah, Justice Brennan reinstated a district court's order requiring the City to allow the display. 58 U.S.L.W. 3426 (Dec. 22, 1989). The Supreme Court then refused to vacate Justice Brennan's order by a vote of 6-3. *Chabad v. City of Pittsburgh*, 493 U.S. 1012 (1989).

B.

The two Supreme Court decisions involving the use of public school and university facilities for meetings by religious groups reached the same conclusion--that the public educational bodies did not violate the Establishment Clause.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Supreme Court held that a state university which makes its facilities generally available for the activities of registered student groups may not deny use of those facilities to a registered student group desiring to use them for religious worship and religious discussions. The Court found that the university's policy of permitting general use of facilities for similar nonreligious group meetings had created a "generally open forum." *Id.* at 267. The use of a public forum for religious worship and discussion is a form of speech and association that is protected by the First Amendment. In order to deny use of the facilities based on the religious content of the group's intended speech, the university would be required to show that the denial served a compelling state interest. *Id.* at 269-70.

The Supreme Court agreed with the university that prohibiting a violation of the Establishment Clause would rise to the level of a compelling state interest, but concluded that permitting equal access to the facilities for group discussion and worship was permissible. *Id.* at 271. In making this determination, the Court applied the three-pronged *Lemon* test, 403 U.S. at 612-13, since followed in most Establishment Clause cases. As Justice Powell wrote in *Widmar:*

> Those cases hold that a policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the [policy] must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). See *Committee for Public Education v. Regan*, 444 U.S. 646, 653 (1980); *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 748 (1976).

454 U.S. at 271.

Concluding that the first and third prongs were clearly met, the Court centered its discussion on the question whether the primary effect of permitting the religious group to use the facilities would be neither to advance nor inhibit religion. Although opening the facilities to the petitioning group might confer "incidental" benefits on religious groups, the Court found this not to be the primary or principal effect of such an action. *Id.* at 273-74. Two factors were deemed "especially relevant:" (1) "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices;" (2) "the forum is available to a broad class of nonreligious as well as religious speakers." *Id.* at 274.

*Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 110 S. Ct. 2356 (1990),

concerned a public high school in Nebraska that made its facilities available to organizations that met the definition of "noncurriculum related student groups" under the Equal Access Act, 20 U.S.C. §§ 4071-4074. The Supreme Court held that the Act prohibits a public school from denying a student religious group permission to meet on school premises during noninstructional time. The Court found that Congress extended the reasoning of *Widmar* to public high schools by enacting the Equal Access Act. 110 S. Ct. at 2364.

Applying the *Lemon* test as in *Widmar*, the *Mergens* Court concluded that the Act does not have the primary effect of advancing religion and thus that the Act is not unconstitutional on its face. *Id.* at 2373. The school's official recognition of the religious group would not "effectively incorporate religious activities into the school's official program, endorse participation in the religious club, [or] provide the club with an official platform to proselytize other students." *Id.* at 2370. The Court added, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 2372. (emphasis in original).

III.

A.

This court has dealt with the issue of religious symbols being placed on public property either by governmental units or private parties several times since the Supreme Court decided *Lynch*.

In *ACLU v. City of Birmingham*, 791 F.2d 1561 (6th Cir.), *cert. denied*, 479 U.S. 939 (1986), a divided panel held that a city violated the Establishment Clause by displaying a city-owned creche on the lawn of City Hall during the Christmas season. The nativity scene included

the traditional figures used to depict the Biblical story of the birth of Jesus. "Absolutely nothing else [was] included in the display." *Id.* at 1562. Applying the three-pronged *Lemon* test and Justice O'Connor's endorsement standard in *Lynch*, the majority of the panel concluded that the display in a prominent position on the lawn of the official headquarters building of the municipality, without any offsetting secular symbols of the season, had the effect of endorsing Christianity.

The creche called attention to a single aspect of the Christmas season--its religious origin. Thus, standing alone without any nonreligious symbols, it

> sen[t] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

*Id.* at 1566 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

The dissenting panel member was disturbed by the fact that constitutional jurisprudence has strayed far from the original intent of the Eighteenth Century statesmen who included the Establishment Clause in the First Amendment. Even applying *Lynch*, however, Judge Nelson found no endorsement in the City of Birmingham display, concluding that courts are not required to apply "a 'St. Nicholas too' test." *Id.* at 1569.

*ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990), arose when the Commonwealth of Kentucky erected a 15-foot high stable, containing approximately 20 by 30 feet of floor space on the State Capitol grounds during the 1988 Christmas holiday season. The stable had a manger and some straw inside, but it contained no statues or figurines traditionally used to depict the birth of Jesus and events that followed. The ACLU sought an injunction to require the State to remove the stable. Three times prior

to the district court hearing church groups were permitted to conduct pageants in and around the stable with live persons and animals representing figures in the Biblical story. *Id.* at 1100-01.

The State Capitol stands at the end of a broad avenue. Light poles along this street were decorated with evergreens and red bows, and trees and light poles on the Capitol grounds were lighted and decorated. The district judge held a hearing and viewed the site. He denied the request for an injunction, provided the State prominently displayed a sign advising the public that the area around the stable was a public forum available to responsible civic and religious groups "for holiday ceremonies, pageants or displays;" that the State adopt a formal written policy consistent with this notice; that private funds defray all expenses in connection with the stable; and that the State post a disclaimer in front of the stable "in letters big enough to be read from an automobile passing on the street before it." *Id.* at 1100.

A divided panel of this court affirmed the judgment denying an injunction. The majority opinion distinguished *City of Birmingham* and *Allegheny County* as follows:

> The present case differs from both *City of Birmingham* and *Allegheny County* in that here we have a structure capable of use for non-religious purposes, and the structure is unaccompanied by any display of religious figurines or statues. The nativity scene in *City of Birmingham* was comprised *solely* of "figurines depicting the Christ Child, the Mother Mary, Joseph, three costumed shepherds, and several lambs," 791 F.2d at 1562, while the *Allegheny County* creche included "figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger. . . ." 492 U.S. at ____, 109 S. Ct. at 3094, 106 L.Ed.2d at 486.

*Id.* at 1103. Nevertheless, because there were no secular symbols associated with the season in the immediate area of the stable, the majority concluded that, in the absence of a disclaimer, the unadorned stable might lead a "reasonable observer" to find some religious significance in the display. *Id.* The combination of notice that the area was a public forum and the unequivocal disclaimer were found sufficient to dispel any message of endorsement.

Judge Wellford dissented, primarily on the ground that "[t]he court required disclaimer sets the real facts on their head." *Id.* at 1112. In effect, the district court, in Judge Wellford's opinion, "substitut[ed] . . . other facts and factors [different from those stipulated] initiated by the district court on its own volition." *Id.*

*Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990), involved a citizen's challenge to the display of a creche containing all the traditional figures on the front lawn of the City Hall. Many secular figures and symbols were included in the overall display. Judge Milburn, writing for a unanimous panel, found that the display fell somewhere between the creche and menorah displays considered by the Supreme Court in *Allegheny County*. This court found that the City of Clawson creche, as displayed, did not violate the Establishment Clause, after identifying three factors considered by the Court in *Allegheny* in making its "endorsement" determination: context, composition, and location. *Id.* at 247. Analyzing these factors the court found that

> (1) The creche was displayed in the context of celebration of Christmas as a national holiday;
> (2) The composition of the display included secular symbols of the season that had separate "focal points" with different visual stories to tell, that detracted from the creche's religious message;
> (3) Although the location of the display on city hall lawn was troublesome, the "combined

> display" . . . conveys a "message of pluralism" rather than one of endorsement.

*Id.* at 248-49.

B.

We also have published opinions in connection with stay orders in this case, *Grand Rapids I*, 922 F.2d 303 (6th Cir. 1990), and in *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458 (6th Cir. 1991). In *Grand Rapids I* the panel concluded that Chabad House had demonstrated a sufficient likelihood of success on the merits to warrant this court's staying the district court injunction. That was the only issue before the court, and it prefaced its discussion of the merits by stating: "We strongly emphasize that we are not now deciding the appeal. That must wait until full briefing and the opportunity for oral argument." 922 F.2d at 306.

A divided panel denied a stay of the district court's refusal to enter an injunction in *Congregation Lubavitch v. Cincinnati* upon finding that while Fountain Square is a public forum in Cincinnati, it "does not carry the same suggestion of imprimatur as a location near City Hall." 923 F.2d at 462. Judge Guy dissented and would have granted a stay until the case could be decided on the merits. He expressed the view that the public forum doctrine "does not give members of the public an unfettered right to place tangible objects in a public square and leave them there unattended . . ." 923 F.2d at 463.

IV.

The parties' arguments demonstrate the inherent tension between the Establishment Clause and two other elements of the First Amendment,[1] the Free Exercise and Free Speech Clauses. In addition to relying on Supreme Court

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[1]The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech. . . ."

and Sixth Circuit precedents, they support their opposing views with citations to cases from other circuits dealing with the general problem of religious displays in public areas. We will discuss some of these decisions where helpful, but believe the Supreme Court decisions and those of this court provide the answers to the questions raised by the present appeal.

A.

The intervenor, Chabad House, pitches its argument almost entirely on two factors in the case: Erecting and leaving the menorah on Calder Plaza during Chanukah involves (1) *private* expressive conduct (2) in a traditional *public forum*. Even if the menorah is a purely religious symbol, because it was placed in a public forum, Chabad House is entitled to the "most stringent protection" of its right to speak in that location. Restriction of that right by a governmental agency based on the content of the message is permitted only to serve a compelling state interest, and any restriction must be as narrowly drawn as possible to serve that interest.

Chabad House then asserts that the Establishment Clause does not provide the compelling interest required before the menorah may be excluded from the public forum. Relying on *Widmar* and *Mergens*, Chabad House contends the fact that Calder Plaza is a public forum would prevent any reasonable observer from concluding that Grand Rapids embraces religion by merely permitting a private group to display a symbol of its religion there. Thus, it contends that *Allegheny County* does not control because, unlike Calder Plaza, the Grand Staircase was not a public forum. Chabad House argues that the disclaimer sign is a determinative factor, as in *Wilkinson*, because it provides a "straightforward answer" to the question of whether the display represents an endorsement of Judaism.

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These prohibitions apply to the states (and their political subdivisions) by virtue of the Fourteenth Amendment.

Further, according to Chabad House, the *Lynch* requirement of secular symbols to provide several focuses only applies when the government erects or funds the erection of a religious display on publicly owned property. It does not apply when a private group is fully responsible for the display and the government only furnishes the location. Finally, Chabad House avers that the right to speak in a public forum does not turn on proximity of the forum to government buildings.

The City of Grand Rapids emphasizes the nature of Calder Plaza as well, confirming that it has never made a content-based requirement for using the square. The City does not own, erect, store, or otherwise control the menorah.

B.

The plaintiffs, Americans United for Separation of Church and State and the Grand Rapids residents, emphasize the "overpowering presence" of government on and around Calder Plaza and the fact that the menorah stood alone, unadorned and unattended in proximity to the government buildings. Thus, the plaintiffs argue that this governmental presence transformed Chabad House's purely religious private speech into prohibited government speech. The plaintiffs contend that the small sign placed by the large menorah did not effectively disclaim city involvement in the religious display. There was no showing, as in *Wilkinson*, that the sign could be read by a passing motorist or other observer who might view it from some distance. Given the size of the menorah, this is significant. Furthermore, the plaintiffs point out that the stable in *Wilkinson* had no religious significance standing alone; it was only when live actors portrayed the Christmas nativity story that it acquired such significance. By contrast, they maintain, the menorah in the present case, is a purely religious symbol that conveys a religious message standing solitary and unattended. When the live actors finished their pageants in *Wilkinson* they left an ordinary stable with no religious trappings; when the

nightly candlelighting ceremony at the menorah ended, the celebrants left standing in the public square a purely religious symbol.

The plaintiffs contest Chabad House's claim that *Allegheny County* has no application to this case, and that it is controlled entirely by *Widmar* and *Mergens*. In agreement with Judge Feinberg in *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), the plaintiffs contend that a rule granting an absolute constitutional right to engage in expressive religious conduct in a public forum on government property "would swallow up the Establishment Clause." No group that has used Calder Plaza to convey its views on religious, social, or political issues has been permitted to leave symbols of its views on the square unattended after the program or demonstration has ended. Like the stable in *Wilkinson*, the Italian Fair exhibition booths had no religious significance after the Catholic mass was over and its trappings removed.

C.

In reply the appellants contend that the cases make no distinction between unattended displays and those where live humans speak and otherwise act out a message. They stress the "critical distinction" between governmental and private religious speech and maintain that when a private party displays religious symbols, it is irrelevant whether other symbols are present, that the "context" factor discussed in *Allegheny County* applies only to governmental displays.

V.

This is a close case, and we begin our legal analysis by attempting to define the issue as carefully as possible.

The case is not concerned with Chabad House's right to conduct candlelighting services on Calder Plaza each evening during Chanukah. Thus, cases such as *O'Hair v.*

*Andrus*, 613 F.2d 931 (D.C. Cir. 1979), in which the court found no Establishment Clause violation in permitting the Pope to conduct a Roman Catholic mass on the National Mall, do not apply. Similarly, *Widmar* and *Mergens* are distinguishable for the fact that the empty classrooms that remained after the religious clubs had finished their meetings contained no religious symbols from which a "reasonable observer" could infer an endorsement of religion by the university or high school authorities.

This case is also not about a city-owned, maintained or erected religious symbol. This fact distinguishes *Lynch* and *City of Birmingham*. In addition, the menorah stood on government-owned land surrounded by buildings used for core government functions; it was not erected in just any public park. This fact distinguishes *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd sub nom., Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985), cited by the appellants, and *Congregation Lubavitch v. City of Cincinnati*, supra.

The fact that we distinguish the cases discussed here does not signify that we find no controlling principles in them. They illustrate our determination that no single case or series of cases totally encompasses the scenario of the present case. The cases differ and a factual analysis is required in each.

This case is about a large religious symbol with two relatively small disclaimer signs, displayed prominently in the principal public square of a city that contains some buildings and is flanked by others in which core government functions are conducted. The symbol is permanently installed for the eight days of the sponsoring faith's religious holiday, and except for a period of approximately one hour each evening it is left unattended. The menorah and disclaimer sign are lighted at night.

The closest case on the facts that we have found or been referred to is *Smith v. County of Albemarle*, 895 F.2d 953

(4th Cir. 1990). There a divided panel found that a nativity scene erected on the front lawn of the County Office Building by a private group violated the Establishment Clause. There were no secular Christmas symbols in the area and the creche was directly in front of the County Office Building, with American and Virginia State flags "in the general line of vision when viewing the creche." *Id.* at 955. An 18 inch by 6 inch sign identifying the sponsoring group was found to be an insufficient disclaimer. The court of appeals agreed with the County that the place where the display stood was at least a "designated public forum," which required that there be a compelling state interest in order to permit content-based regulation of speech there. The court found that preventing a violation of the Establishment Clause by the narrowly tailored means of ordering removal of the creche was a justified limitation on the right of free speech. *Id.* at 959.

## VI.

Although frequently criticized, the three-pronged *Lemon* test continues to have the support of the Supreme Court. *Allegheny County*, 492 U.S. at 592 (majority opinion of Justice Blackmun); *id.* at 655 (concurring and dissenting opinion of Justice Kennedy). Applying that test we agree that the appellants satisfy both the first and third prongs--the City has a secular purpose in treating this display the same as all others allowed on the plaza, and no "entanglement" results from permitting it. Thus, as is usually the case with religious displays, the decisive question is whether "the principal or primary effect" of this display was to advance religion. To answer this question we apply the standard of "endorsement in the eyes of a reasonable observer" first advanced by Justice O'Connor in *Lynch* and accepted by at least a majority of the Court in more recent decisions.

A.

We believe Chabad House makes too much of the fact that the "speech" involved is that of a private group rather than speech directly by a government. It appears to argue that the Establishment Clause applies only when the government is the speaker. That reading of the First Amendment is too narrow under existing precedents. Justice Blackmun wrote for the Court in *Allegheny County*:

> But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. See, *e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of "endorsement" conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

492 U.S. at 600-601. A government's support and promotion of a private organization's religious communications violate the Establishment Clause.

The Supreme Court referred to the "crucial difference" between government and private speech endorsing religion in the context of a school's efforts to comply with the Equal Access Act. *Mergens*, 110 S. Ct. at 2372. The Court did not hold or intimate that government action that supports or endorses private organizations' religious communications can never run afoul of the Establishment Clause. The quotation relied upon by Chabad House merely expresses the truism that private religious

expressions are not affected by the Establishment Clause *absent* some governmental act of support or promotion.

B.

We believe that Chabad House also misconstrues the significance of the fact that the menorah stood in a public forum. The fact that religious expression takes place in a public forum does not in any way lessen the force of the Establishment Clause; that fact does, however, require a stringent examination to determine whether the government's effort to limit speech in that setting serves a compelling governmental interest and whether such limitation is narrowly drawn. To accept Chabad House's construction of the interplay between Establishment Clause principles and the public forum doctrine would turn the Establishment Clause into a paper screen rather than the bulwark of separation between church and state.

The issue in *Mergens*, from which Chabad House draws its open forum argument, was whether a government agency--a high school--could constitutionally deny a private group use of school facilities after instructional hours to conduct a meeting involving religious expression. Only after finding that the school board's action in complying with the Equal Access Act did not amount to an endorsement of religion did the Court hold that use of the facilities for that purpose could not be denied because the school was a limited public forum. There is no intimation that if the Court had ruled otherwise on the endorsement question the public forum doctrine would have required permission to use the facilities despite the fact that such use would have violated the Establishment Clause.

Permitting the after-hours use of classrooms for meetings by religious groups could not be found to have the primary or principal effect of furthering religion. The whole purpose of a school or university is to deal in ideas, impart information and stimulate thoughtful discussion. Any "incidental benefit" to a religious group from being

permitted to use school facilities for its meetings would not offend the second prong of the *Lemon* test. The primary effect would have been to further the school's reason for being. As the Court stated, "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Widmar*, 454 U.S. at 274. The mission of a public school or a public university is the promotion of free exchange of ideas and nothing about the use of its facilities for discrete religious discussions sends a signal of endorsement.

C.

Contrary to Chabad House's contention, *Allegheny County* is not rendered irrelevant to our decision by reason of the fact that the Grand Rapids menorah was owned and erected by a private organization. The creche and menorah in *Allegheny County* were privately owned, yet the Supreme Court considered the context, composition and location of the displays the same as if they had been owned and put in place by the County.

In our most recent decision on the subject, *Doe v. Clawson*, this court concluded that religious displays during the Christmas holiday season satisfied the first *Allegheny County* requirement, in that they were maintained in the context of a national holiday. 915 F.2d at 247. The *Clawson* court also found that *Allegheny County* required that the religious object or symbol located on government property not be the only features of the display. This composition requirement is not satisfied unless there are other objects or symbols as well that provide separate focal points and tell other specific [non-religious] stories. The creche in *Lynch* and the menorah in *Allegheny County* satisfied the composition requirement, but the creche in *Allegheny County* did not because it was "the single element of the display on the *Grand Staircase*." *Id.* (quoting *Allegheny*, 492 U.S. at 598). There were no offsetting secular symbols to detract from the creche's religious message.

As to the third test--location--the particular physical setting of the creche in *Allegheny County* at the most visible place in the county seat building sent an unmistakable message that the County supported and promoted the creche's Christian message. The *Clawson* court noted that Justice Blackmun stated in a footnote in *Allegheny County* that the creche on the staircase did not raise the public forum issue that was presented in *McCreary v. Stone*, where a private creche was placed in a public forum park. 915 F.2d at 247, citing [492 U.S. at 600] n. 50. There is no indication in Justice Blackmun's opinion, however, that the Establishment Clause analysis would have been different if the staircase had been a public forum. That fact would only have increased the burden to demonstrate that requiring removal of the creche or a change in the composition of the display would serve a compelling state interest in a narrowly tailored manner. Regardless of whether a display is in a public forum or not, if an Establishment Clause violation is claimed because of the context, composition or location of a religious symbol or religious activity, a court must apply the endorsement test to decide that issue.

## *CONCLUSION*

The facts of this case are different in significant ways from other Establishment Clause cases decided by this and other courts. Though the display was in place during a portion of the traditional Thanksgiving to New Year's Day Yuletide, the menorah was not displayed in the context of the national Christmas holiday season. The composition of the display consisted solely of the menorah, without any other objects, symbols or displays to provide competing focuses or to suggest other "visual stories" to the observer. Standing alone the menorah did not convey either a message of neutrality as to religion or a "message of pluralism." *Allegheny County*, 492 U.S. at 635 (O'Connor, J., concurring). The message it sent related to a single religion--Judaism. Both the context and composition of the display are problematic. Given all the facts, we believe the location of the display is

determinative. Thus, we conclude that the presence of the unadorned menorah, standing in the City's principal square alone except for the City's symbol and the flags of three of the units of government housed there and in close proximity to the government buildings, would convey a message of endorsement--that is, one of support and promotion--to a reasonable observer. We note in connection with location of the display that the panel which denied a stay in *Congregation Lubavitch v. Cincinnati* based its decision in part on the fact that the public square where the menorah was placed did not carry the "same suggestion of imprimatur" as a location near City Hall. 923 F.2d at 462. Here we have not a location near one government building; rather it is a location that is pervasively identified with three levels of government.

We also conclude that the relatively small disclaimer signs cannot be held sufficient to defeat the message of support or promotion. As the photographs in the Appendix show, even at the relatively short distance from which the pictures were made, only "Happy Chanukah To All" is legible. This is the message which will be first observed and is not a disclaimer at all. The balance of the sign contains the disclaimer of thirty-one words. It can be read by pedestrians nearby, but the menorah can be seen from the street and from the public buildings on the opposite side of the plaza.

Further, the court noted in *Wilkinson* that the stable was capable of a nonreligious use and was unaccompanied by any religious figurines or statues. When the stable stood alone and unattended after the actors left with props, the small disclaimer might have been sufficient to dispel any possible impression of government endorsement of a religion. That cannot be said of the large menorah in this case that was not intended to have and could not reasonably be viewed as containing a non-religious meaning.

The parties have discussed extensively the significance of the fact that the menorah was unattended for most of

each of the eight days it was displayed. Given the size of the menorah and its appearance of permanence, we believe the fact that no one was present to relate the display to the exercise of religious practices by a private group added to the total message that a reasonable observer would receive. During the nightly candlelighting ceremony any reasonable observer would understand that the only role of the City was to provide a place--a public forum--for the religious practices of the private group. The reasonable observer would not be misled, any more than one viewing the Pope's mass on the National Mall would have been. *Andrus*, 613 F.2d 931. But, when the mass was over, the private sponsoring group removed the symbols and trappings of their faith and there was nothing for an observer to observe but an empty mall. Similarly, the empty classrooms after the religious meetings ended in *Mergens* and *Widmar*, and the empty shed in *Wilkinson*, were totally bereft of any religious message.

We believe the public forum doctrine fully protects the right of Chabad House to conduct Chanukah services on Calder Plaza, but it does not provide a basis for the City's permitting this large menorah to remain in place throughout the eight days of the religious observance. The combination of the menorah's size, its location, and the fact that it stood in "splendid isolation" except for the pervasive presence of government buildings and unattended except for one-hour daily services, all added to its appearance of permanence and of endorsement as found by Judge Enslen.

Rather than comparing the display of the menorah during the eight days of Chanukah with a creche displayed during the Christmas holiday season, we find it more akin to the display of a 20-foot high cross, unadorned and unaccompanied by any other secular or religious symbols, during the seven days of Holy Week. Such a display of the universally recognized symbol of Christianity under the same conditions and at the same location as the menorah in this case would surely be found to be an endorsement of that religion. We believe the same

conclusion must result from the display of this menorah. See *Allegheny County*, 492 U.S. at 633 (Justice O'Connor's comparison of Chanukah with Easter as religious holidays with some secular overtones, though not national holidays comparable to Christmas).

The dissent quarrels with our conclusion that *Smith v. County of Albemarle* closely resembles the present case, stating that the courthouse lawn in *Smith* was not a traditional public forum. The district court in *Smith* found that the lawn was "similar to other settings found to be a traditional public forum," and was at least a "designated public forum." 895 F.2d at 959. More significant, however, is the court's statement that

> whether the lawn is or is not a public forum [ ] is not dispositive. The critical gauge of any such content-related speech restriction is whether the overall context and nature of the restricted display conveys the impermissible message of governmental endorsement of religion.

*Id.* at 958. We agree.

The dissent points out that the display in *Clawson* was government-sponsored. Regardless, however, of whether that display was privately or publicly sponsored, the *Clawson* court's analysis of the setting of the display has relevance to our inquiry. The *Clawson* case adopted the methodology of *Allegheny County*, in which the context, composition and location of the display were considered, without any indication that this particular analysis would differ if the displays were publicly owned.

The dissent also seeks to buttress its arguments by referring to the "flag burning case," *Texas v. Johnson*, the "improper flag display case," *Spence v. Washington* and other decisions protecting symbolic speech. Nothing in this opinion questions the established principle of First Amendment protection for symbolic speech. However, the cases relied upon did not involve the Establishment

Clause and are, thus, irrelevant to our inquiry. As we stated at the beginning of this opinion, the present case requires us to resolve tension between the Establishment Clause and the Free Speech Clause, when the "speech" promotes a religion.

The dissent states that "no one seriously can argue that the average Grand Rapids citizen believes that the city is endorsing the Lubavitcher sect of orthodox Judaism by allowing the Chabad House display." Presumably, this statement is based upon the fact that a majority of Grand Rapids residents with religious preferences are Christians. We fail to see the significance of this observation. Of course the viewers of the display were not limited to Grand Rapids citizens. Visitors, passsers-by, and passers-through would see the display, as the photograph in the appendix vividly shows. We understand the Establishment Clause to require governments to be neutral in all matters religious, endorsing no religion, regardless of the religious identification of their inhabitants.

We have never intimated that the City of Grand Rapids intended to endorse the Chabad House's version of religious truth. That is not the issue, however. In formulating the now generally accepted endorsement test, Justice O'Connor emphasized that it is only government practices having the effect of endorsement, "whether intentionally or unintentionally, that made religion relevant, in reality or public perception, to status in the political community" that are forbidden. *Lynch*, 465 U.S. at 692.

The judgment of the district court is affirmed.

# APPENDIX

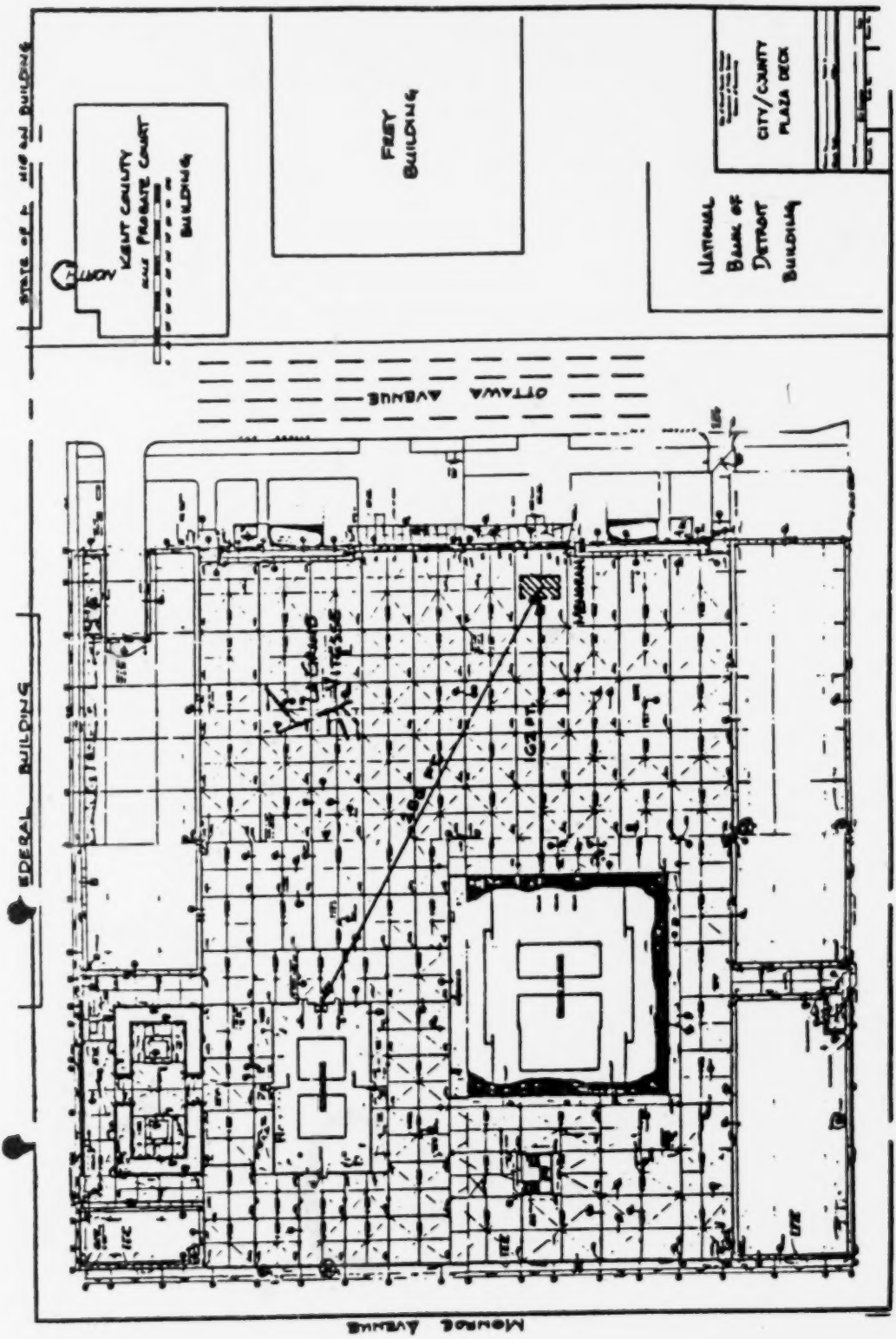
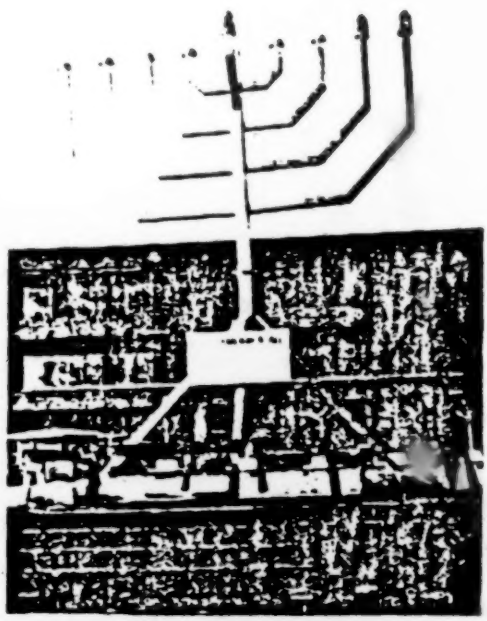
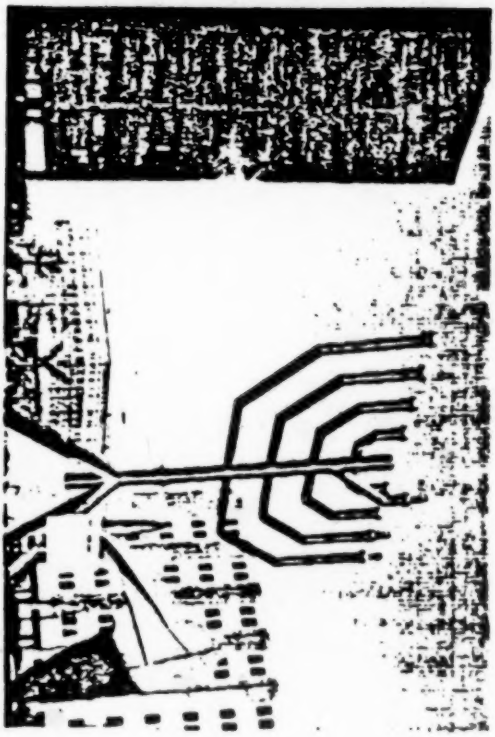

KENT COUNTY AND PROBATE COURT BUILDING
FEDERAL BUILDING
CITY/COUNTY PLAZA DECK
NATIONAL BANK OF DETROIT BUILDING
OTTAWA AVENUE
FEDERAL BUILDING
MONROE AVENUE

EXHIBIT B





KENNEDY, Circuit Judge, concurring. I concur in the majority opinion, but write separately to emphasize what I see as the crux of the interplay between the establishment clause and the free speech clause presented by this case.

For me, this case turns on the question, "whose speech is it?" Since the speech involved is clearly religious speech, if the speaker is the government of Grand Rapids, or any other government unit, the establishment clause forbids it as an unconstitutional endorsement of [a] religion. If the mythical, and much maligned, reasonable observer would unfailingly know the speech to be purely and completely that of a private citizen, the freedom of expression clause protects that speech from government interference or infringement. If the government is involved in the promulgation of a private citizen's religious speech, such as by providing a forum or mechanism for dissemination, the question becomes whether the government's actions can be said to endorse the speech, or more properly a message inherent in the speech, such as conferring favor on religion, or on any particular religion. Both the majority opinion and the dissent have carefully analyzed the case law addressing this question of whether the government actions are so facilitative or favorable as to in fact constitute a form of secondary endorsement of the nominally private speech.

In my opinion, the case can be resolved without deciding that question. This is because my answer to the preliminary question of "who is to be considered the primary speaker?" is "the government units represented by the building[s] and flag[s]." The resulting speech is easily characterized as an impermissible endorsement.

My analysis differs from that of the dissent at the threshold question of whether religious speech should be treated differently from other kinds of speech. The establishment clause demands that it be so. Government units are under no obligation to carry out the laudable function of providing a particular public forum to facilitate the promulgation and dissemination of private

speech. When they choose to do so, they must comply with all clauses of the Constitution. If a government unit takes active steps to promote private speech, it must do so in a manner that does not leave a reasonable bystander with the impression that the government is either sponsoring or endorsing a religious message, in contravention to the establishment clause.

The establishment clause does not limit the rights of Chabad House to speak as it chooses, therefore, but rather limits the rights and latitude enjoyed by government units in providing mechanisms for facilitating this nominally private speech. In my view, Grand Rapids is constitutionally compelled to provide its municipal services, including provision of a public forum, in a manner that does not violate the establishment clause. Under the analysis of the dissent, government units are free to promote religious speech, as long as they do not consciously promote religious speech any more than any other form of speech. I disagree, for even the appearance of an endorsement or directed facilitation violates the establishment clause. In order that the establishment clause not be completely swallowed up by the free speech clause, therefore, government involvement in speech must be effectuated in such a way that any resulting religious speech does not appear to be in any way favored or promulgated by the government.

Grand Rapids can fulfill this requirement in several ways. As part of regulating the use of the forum, it can require that religious speech be identifiable as that of a particular private speaker. Thus, the granting of permits may be conditioned upon satisfaction of one of several requirements; for example, symbolic religious speech must be attended, or be accompanied by adequate disclaimers identifying the identity of the speaker, or at least the non-governmental nature of the speaker. Or, Grand Rapids can take steps in the providing of the forum that eliminate the possibility of a reasonable inference of government speech, for example by making clear to all reasonable observers that Grand Rapids does not in any

way endorse the speech being facilitated. In this case, however, a sub rosa policy of neutrality does not satisfy the establishment clause burdens on Grand Rapids.

We have here a public forum provided by the government in which some speech, the Calder sculpture, is in some fashion endorsed by the government, and other speech, the menorah, is not readily identifiable as not being endorsed or promulgated by that same government. In light of the overwhelming size and permanent appearance of the menorah, and the absence of identifiable responsible parties for twenty-three hours a day, it is not unreasonable for a neutral observer, with no knowledge of the respective religious communities' representations and no knowledge of the permit requirements, to conclude that it may in fact be a government display. In fact, for twenty-three hours a day the only distinction between the Calder sculpture and the menorah in the eyes of a reasonable observer is the disclaimer sign.

In this case, the disclaimer is clearly inadequate to its task. The disclaimer is not at all visible to the majority of the audience of the speech. As noted by the majority opinion, the most visible part of the disclaimer is in fact not a disclaimer at all, but rather more religious speech. The actual dissociative message of the disclaimer is not available to the vast majority of the audience of the symbolic speech, and therefore cannot redeem it. I do not think it necessary to address all the possible relative size and viewing combinations with respect to the symbolic speech's audience and the disclaimer's audience, but I have no trouble concluding that in light of the many factors lending credence to an inference that the menorah is government speech, this disclaimer is inadequate.

A reasonable observer of Calder Plaza, seeing a seemingly permanent and orphan sculpture at one end and a similarly permanent and orphan religious symbol at the other end, could easily infer that Grand Rapids has, for whatever reason, decided to participate in the Chanukah

celebration. This appearance of an endorsement, however unintended, violates the establishment clause.

BOGGS, Circuit Judge, dissenting. The court admirably describes the facts of this case, and accurately discusses current law from the Supreme Court and this circuit in the area of religious displays on public property. Unfortunately, it draws a thunderously wrong conclusion when applying the law to the facts. By doing so, it strikes at the very heart of free speech and the public forum. To suggest that granting non-discriminatory permission for the expression of a message--religious, political, or otherwise--represents an endorsement of that message is profoundly mischievous and destructive of free speech.

To support this false conclusion, the opinion goes further astray by invoking a "reasonable observer," who resembles neither a real person nor any creature known to the law. Furthermore, the vague process hinted at by the court to approximate the views of the reasonable observer risks severe Establishment Clause problems by insuring entanglement of government and religion. Finally, the court provides no guidance for district courts, local governments, or religious groups. It lays a foundation for future cases in this circuit to be determined entirely by the personal perceptions of particular panels, rather than reasoned arguments of law.

The court could have avoided these problems had it recognized the full importance of a traditional public forum to a reasonable observer. Private religious speech in a public forum, as long as the forum is truly open to all points of view, can never represent government endorsement of religion to a reasonable observer. Because a truly reasonable observer sees no endorsement, no court can find an establishment of religion as defined by the Constitution or recent Supreme Court doctrine.

I

The court acknowledges, as it must, that the City of Grand Rapids has no connection with the menorah in this case. Grand Rapids neither erects, maintains, nor stores the menorah. It provides no funds for the display other

than through the provision of electricity, and this cost is fully offset by a fee. Furthermore, Grand Rapids provides no indirect support for the menorah, such as allowing Chabad House to display it in an area prohibited to others. All parties to this case have clearly stipulated that since Calder Plaza was opened in 1969, Grand Rapids has treated it as a traditional public forum, allowing all forms of speech and assembly. No group has ever been denied permission to use the plaza.

The court also acknowledges, as it must, that the city's decision to treat Calder Plaza as a traditional public forum grants Chabad House significant constitutional protection. In *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948 (1983), the Supreme Court recognized that "these quintessential public forums," "'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" 460 U.S. at 45, 103 S. Ct. at 954-55 (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 963 (1939)). It held that no government may exclude speech from a traditional public forum unless "its regulation is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." 460 U.S. at 46, 103 S. Ct. at 955; *see also United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990). In this case, the courts, rather than the local government, wish to establish content-based regulation; nevertheless, the same principles apply.

Chabad House certainly merits the full protection of the traditional public forum doctrine. The Supreme Court has long held that the protection of free speech "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 2539 (1989). Instead, the Constitution protects any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409, 94 S. Ct. 2727, 2730 (1974). The Supreme Court

has extended constitutional protection to many non-verbal forms of communication. In *Texas v. Johnson*, the Supreme Court applied the first amendment to preclude prosecution of someone who burned an American flag. The Court has also recognized that students' wearing of black armbands to protest American military involvement in Vietnam constituted protected speech, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505, 89 S. Ct. 733, 735 (1969). Moreover, the first amendment protects a sit-in by Blacks protesting segregation who were otherwise lawfully in the reading room of a public library, *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S. Ct. 719, 723-24 (1966) (Fortas, J.) (plurality opinion); the wearing of American military uniforms in a play attacking the Vietnam War, *Schact v. United States*, 398 U.S. 58, 90 S. Ct. 1555 (1970); and some forms of picketing, *see, e.g.*, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-14, 88 S. Ct. 1601, 1605-06 (1968); *United States v. Grace*, 461 U.S. 171, 176, 103 S. Ct. 1702, 1706 (1983).

Furthermore, Chabad House's decision to engage in religious speech does not limit its freedom; religious speech and association receive the full protection of the first amendment. *See Widmar v. Vincent*, 454 U.S. 263, 268-69, 102 S. Ct. 269, 274 (1981); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S. Ct. 2559 (1981).[1] Justice Brennan has explained this principle quite eloquently:

> Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly

[1] In *Widmar*, Justice White argued that religious worship is not protected by the free speech guarantee of the first amendment, but is protected instead by the religion clauses. *Widmar v. Vincent*, 454 U.S. 263, 284, 102 S. Ct. 269, 281-82 (1981) (White, J., dissenting). The Court, however, specifically rejected this argument. 454 U.S. at 269 n.6, 102 S. Ct. at 274 n.6.

> understood, is a shield against any attempt by government to inhibit religion as it has done here. . . . It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

*McDaniel v. Paty*, 435 U.S. 618, 641, 98 S. Ct. 1322, 1336 (1978) (Brennan, J., concurring) (footnote omitted).

Thus, if this court is to prevent Chabad House's speech in this public forum, it must do so without regard to the fact that its display apparently offends some people, including the plaintiffs. Religious speech may cause extreme pain to certain members of society. This court may wish to protect society from such pain, particularly when it might appear that the purveyors of religion can spread their message elsewhere and avoid public property. We must reject this temptation. The Constitution is specifically designed to protect free speech and religious expression, although they may offend some, or even many, in our society. The first amendment contains no exception for offensiveness, and the traditional public forum doctrine applies as much to clerics as to communists. We must never allow religious furor to blind us to our obligation to protect the right of all groups, however unpopular, to be heard.

Over forty years ago, the Supreme Court recognized that while free speech breeds controversy, it must be protected:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

*Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 896 (1949). *See also* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 **Ind. L.J.** 351, 353 (1991) ("In establishment and free exercise matters, as well as speech, communication should not be inhibited out of deference to listener sensibilities.") We must keep Chabad House's right to freedom of speech clearly in mind as we decide this case. The district court can be affirmed only if we are certain that the alleged constitutional violation caused by Chabad House's menorah justifies an abridgement of its first amendment rights.

Unfortunately, in this case, no such clear violation has been demonstrated. In its apparent effort to keep this decision "fact-specific," the court simply never explains how the display at issue purports to establish a religion. It simply announces "that the presence of the unadorned menorah, standing in the City's principal square alone except for the City's symbol and the flags of three of the units of government housed there and in close proximity to the government buildings, would convey a message of endorsement--that is, one of support and promotion--to a reasonable observer." Maj. Op. at 24. This statement is clearly unsupported by the relevant law and cannot be justified on the facts of this case.

II

Since Chabad House is not a government, it cannot establish a religion; Grand Rapids is the only party to this case with such power. In order to determine whether Grand Rapids has violated the Establishment Clause, we must turn to the famous three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits

> religion; finally, the statute must not foster "an excessive government entanglement with religion."

(quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 674, 90 S. Ct. 1409, 1414 (1970)) (citations omitted). As the court wisely recognizes, Grand Rapids's policy of treating religious speech like all other speech serves a secular purpose.[2] The establishment of a public forum is a laudable goal, one of the glories of Anglo-American politics, and part of a worthy tradition dating back to the Greek agora and the Roman forum. Furthermore, the policy avoids entangling government with religion, as no bureaucrat need decide which groups may use the plaza. Therefore, this court need only decide whether the "principal or primary effect" of the public forum policy is one that advances or inhibits religion.

A

In *Allegheny County v. ACLU of Greater Pittsburgh*, 492 U.S. 573, 109 S. Ct. 3086 (1989), a majority of the Supreme Court adopted a test first proposed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 1367 (1984): government action advances religion if it endorses particular religious beliefs.

> Since *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

492 U.S. at 597, 109 S. Ct. at 3103 (Opinion of Blackmun, J.) (quoting *School Dist. of Grand Rapids v.*

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[2] "[T]he City has a secular purpose in treating this display the same as all others allowed on the plaza, and no 'entanglement' results from permitting it." Maj. Op. at 19.

*Ball*, 473 U.S. 373, 390, 105 S. Ct. 3216, 3226 (1985)). Justice Blackmun, who delivered the judgment of the Court in *Allegheny*, applied this standard to a menorah display. He explained that "[w]hile an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of those religions, the constitutionality of its effect must also be judged according to the standard of a 'reasonable observer.'" 492 U.S. at 620, 109 S. Ct. at 3115 (Opinion of Blackmun, J.) (citations omitted); *see also Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 493, 106 S. Ct. 748, 755 (1986) (O'Connor, J., concurring in part and concurring in judgment). This court has also acknowledged the importance of Justice O'Connor's "reasonable observer." *See ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1103 (6th Cir. 1990). Thus, I agree with the court that we must determine whether a reasonable observer would conclude that Grand Rapids endorses religion by allowing Chabad House's display.

B

Unfortunately, the court never even attempts to explain its concept of a "reasonable observer," nor does it cite one precedent to explain what the term means. Perhaps it assumes that a definition of this phrase is self-evident. But this is not so; several similar phrases, each with a different meaning, exist in the law. In torts, for example, courts discuss the "reasonable man," who seems to represent the average competent member of society.[3] Surely the court is not using this definition; no one can seriously argue that the average Grand Rapids citizen (or

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[3]"The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard. Nor is it proper to identify him even with any member of the very jury who are to apply the standard; he is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment." William L. Prosser, The Law of Torts 154 (3d ed. 1964).

any informed observer) believes that the city, intentionally or unintentionally, is endorsing the Lubavitcher sect of Orthodox Judaism by allowing the Chabad House display. In fact, I am firmly convinced that the average citizen would express amazement that the law could even imagine that such an endorsement was taking place. Like Beadle Bumble, he would answer that "If the law supposes that . . . the law is a ass - a idiot."[4]

Another definition of a "reasonable person" is found in constitutional criminal law. In *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979), the Supreme Court held that a jury verdict in a criminal trial should be upheld if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (emphasis in original). This concept could be used to support the court's opinion; respect for my colleagues constrains me to agree that *some* rational persons believe that the display constitutes an endorsement of religion. But *Jackson* is surely inapposite to this case; it applies to conclusions reached by a jury, but this case involves no deference to a fact-finder. First amendment cases require a searching inquiry into the facts by higher courts. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27, 104 S. Ct. 1949, 1964 n.27 (1984) ("The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review"). In any event, the issue before this court does not involve a factual determination, but a metaphysical judgment: whether the undisputed facts of this case demonstrate a constitutional violation.

Yet another definition of "reasonable" derives from suits brought under 42 U.S.C. § 1983. Qualified immunity from such suits "extends to every official action except those that any *reasonable official knew or reasonably should have known* violated a clearly established constitutional right." *Pestrak v. Ohio*

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[4] *See* Charles Dickens, Oliver Twist ch. 51 (1838).

*Elections Comm'n*, 926 F.2d 573, 580 (6th Cir. 1991) (emphasis added); *see Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). This rule presents almost the reverse of *Jackson*; it asks what *all* members of a class *should* believe, rather than what *any* member *could* believe. Considering the long history of public use of Calder Plaza, most people who see a menorah display should know that many displays and meetings are found in the Plaza, and should recognize this as yet another in a long series of private messages.

Finally, I note the test used for determining whether a judge should recuse himself or herself under 28 U.S.C. § 455, which is what a "*reasonable person knowing all the relevant facts* would think about the impartiality of the judge." *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980) (emphasis added); *see also United States v. Norton*, 700 F.2d 1072, 1076 (6th Cir.), *cert. denied*, 461 U.S. 910, 103 S. Ct. 1885 (1983). If we applied this standard, we would have to allow the display. No one who knew that Grand Rapids had no direct or indirect connection with the menorah could believe that it endorsed religion. Thus, neither the "reasonable man" of tort law, the "rational trier of fact" in *Jackson*, the "reasonable officer" of qualified immunity law, nor the "reasonable person knowing all the relevant facts" from judicial recusal, supports the court's conclusion. Evidently, the court has summoned an entirely new creature, previously unknown in the law, to judge the display at issue.

C

The court's "reasonable observer" also fails to act according to the guidelines established by precedents from both this court and the Supreme Court. Justice O'Connor, who first promulgated the endorsement test, has emphasized that courts must consider *all* of the facts presented in each case. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 694, 104

S. Ct. 1355, 1370 (1984) (O'Connor, J., concurring). She repeated this warning in *Allegheny*, noting that "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice. . . ." 109 S. Ct. at 3120 (O'Connor, J., concurring in part and concurring in the judgment).

Furthermore, Justice O'Connor has recognized that when a court analyzes a religious display, some facts should receive greater consideration than others. For example, certain religious practices that might otherwise be unconstitutional are valid if their "history and ubiquity" would convince a reasonable observer that they merely represent an "acknowledgment" of religion. Thus, she would allow legislative prayers such as those approved in *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330 (1983), and she has also stated that the Establishment Clause permits "government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.'" *Lynch*, 465 U.S. at 693, 104 S. Ct. at 1369 (O'Connor, J., concurring). She repeated this reasoning in *Allegheny*:

> It is the combination of the *longstanding existence* of practices such as opening legislative sessions with legislative prayers . . . , as well as their *nonsectarian nature*, that lead me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs.

109 S. Ct. at 3121 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added). She has also recognized that the reasonable observer cannot evince hostility toward religion; she asks "what viewers may *fairly* understand to be the purpose of the display." *Lynch*, 465 U.S. at 692, 104 S. Ct. at 1369 (emphasis added).

Thus, when applying Justice O'Connor's analysis to this case, we must examine all the relevant facts and consider carefully the amount of weight to give each fact. We must avoid hasty reliance on partial similarities between the facts at hand and those found in other cases. Even if this display appears similar in some respects to others that have been found unconstitutional in the past, other factors, unique to this case, might require us to uphold the City's decision to grant Chabad House a permit.

Chabad House's display presents a number of surface similarities to other holiday displays that have been found unconstitutional. It sends a religious message, it stands near the heart of local government, and it includes neither large disclaimer signs nor secular symbols. The court correctly recognizes that each of these facts tends to support the claim that the display violates the Establishment Clause. However, the court fails to give sufficient weight to two crucial facts that make this case very different from most holiday display cases: Chabad House's display is privately sponsored, and it stands in a traditional public forum to which all citizens have equal access. Thus, this speech is Chabad House's, not the city's; the city's action is only the neutral one of fairly applying its public forum policy. A close study of recent precedent reveals that although these facts are not automatically determinative, they should carry much more weight than the details of the display on which the court relies.

## III

As noted earlier, Grand Rapids has no direct connection with the Chabad House display. By allowing the display, therefore, the city merely states that it neither favors nor disfavors religious speech. In fact, Grand Rapids does not even go so far as to "acknowledge" religion by permitting the menorah's display; it merely sends a message that religious groups will be treated no worse than others. Anyone familiar with Calder Plaza soon realizes that many groups use it, and that none of these groups receives

special treatment from Grand Rapids. Surely a reasonable observer recognizes the distinction between speech the government *supports* and speech that it *allows*. The court's failure to do so represents a clear misunderstanding of the reasonable observer and of the facts of this case.

The court attempts to base this misunderstanding on this court's interpretation of the endorsement test in *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990). From a further study of Justice Blackmun's majority opinion in *Allegheny*, the *Clawson* court identified three factors to be considered when applying the endorsement test: context, composition, and location. While I do not disagree with *Clawson*, it is simply not very helpful in this case. *Clawson* involved a creche that was "part of the annual Christmas holiday displays *sponsored by the City of Clawson*," 915 F.2d at 248 (emphasis added); this case involves a menorah that the city merely permitted.

Thus, this case differs greatly from *Clawson*, and we must keep this difference in mind when applying the factors of context, composition, and location. Chabad House is clearly exercising its right to religious speech; unlike the courts in *Lynch*, *Allegheny*, and *Clawson*, we need not determine whether the "context" and "composition" of a government's display creates a religious message. Thus, rather than being "problematic," as the court describes them, these two factors simply confirm what no one contests--Chabad House's speech is religious. This leaves the issue of location, which the court describes as the "determinative" factor.[5] If any reasoning supports the court's opinion, it must be that religious expression is simply impermissible within some poisonous "no speech" penumbra emitted by government buildings. Even if this were true for displays

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[5]"Both the context and composition of the display are problematic. Given all the facts, we believe the location of the display is determinative. . . . Here we have not a location near one government building; rather it is a location that is pervasively identified with three levels of government." Maj. Op. at 23-24.

sponsored by the government, it need not be so for private displays. Why should the location of speech be considered more important than the identity of its sponsor and the policy under which the speech takes place? The court never provides a satisfactory answer to this question. Instead of properly weighing the facts, the court applies the *Clawson* factors as if private and public religious speech should be treated identically.

Yet the courts have long recognized a clear distinction between these two classes of religious speech. As Justice O'Connor has stated, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. of Westside Community Sch. v. Mergens*, 110 S. Ct. 2356, 2372 (1990) (O'Connor, J.) (plurality opinion) (emphasis in original). While the Supreme Court has affirmed the rights of private groups to use public facilities to spread a religious message, *see Niemotko v. Maryland*, 340 U.S. 268, 71 S. Ct. 325 (1951); *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148 (1948), it has specifically prohibited public bodies from acting likewise. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963) (banning Bible reading in public schools). These cases demonstrate the critical distinction between private and public speech that must be kept in mind when applying the endorsement test.

Furthermore, if the court wishes to prohibit all religious speech around government buildings, it should provide some guidance to courts that must apply this rule. For example, should courts consider a display's proximity to government buildings, government ownership of the land, or both? In this case, according to the plat, the menorah could move to private property and still be close to the flagpole and other symbols. Even now, the menorah is as close to the private National Bank of Detroit Building as it is to City Hall. Does this make any difference? If the government sells a building to a private owner, does that

building (though known to many as "Old City Hall") lose its power to endorse religion? If a city buys a well-known private building for the mayor's office, does that building become tainted for Establishment Clause purposes? The court addresses none of these questions, yet they naturally arise if we insist on treating public and private speech identically when applying *Clawson*.

Instead of explaining why it has given so little regard to the private nature of Chabad House's speech, the court misstates the issue before this court. It claims that Chabad House "seems to argue that the Establishment Clause applies only when the government is the speaker." Maj. Op. at 20. The court then cites *Allegheny*'s statement that the Establishment Clause "does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations." 492 U.S. at 600, 109 S. Ct. at 3105. This argument only destroys a strawman of the court's own creation. Obviously, government action in support of private religious speech *could* constitute an endorsement of religion, but that does not mean that *all* private religious speech on public property receives such support. Rather than invoking fears of what might happen in some future case, the court should base its ruling on what has happened in this case.

Not all private speech passes the endorsement test. In *Allegheny*, for example, the Supreme Court struck down a creche display sponsored by a private group. However, the Court certainly considered the private nature of the speech in question. It carefully noted that Allegheny County had granted this group special privileges by allowing it to place its creche on the Grand Staircase of the county courthouse.

> The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks

> would then not serve to associate the government with the creche. . . . In any event, the county's own press releases made clear to the public that the county associated itself with the creche. . . . Moreover, the county created a visual link between itself and the creche: it placed next to official county signs two small evergreens identical to those in the creche display.

109 S. Ct. at 3104 n.50.

This case presents no similar connection between Grand Rapids and Chabad House comparable to the relationship between a government and a religious speaker found in *Allegheny*. This case also differs completely from the Seventh Circuit's view of the facts in *Doe v. Small*, 934 F.2d 743 (7th Cir. 1991), in which an Illinois city seemed to treat religion with neutrality, but actually, according to the court, evinced a clear government intention to advance Christianity.[6] Neither does it present the type of financial support for religion condemned in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S. Ct. 890 (1989), in which the Supreme Court struck down a sales tax exemption granted by state law to religious periodicals. In fact, the plaintiffs have presented no evidence of any *sub rosa* attempt by Grand Rapids to encourage the menorah display, or any steps--other than its traditional public forum policy--to endorse religion at all. On these facts, we must acknowledge that the display at issue is purely private, with neither overt nor covert government support, and we must recognized the full significance of this fact.

## IV

Besides failing properly to consider the significance of the fact that this case involves private speech, the court also fails to respect sufficiently the importance of the

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[6]The authority of *Small* itself is in doubt. The Seventh Circuit recently vacated that opinion pending a rehearing *en banc*. *Doe v. Small*, 947 F.2d 256 (7th Cir. 1991).

Grand Rapids policy of equal access to Calder Plaza. Equal access policies provide strong protection for religious speech. The most obvious example of this protection is *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979). In *Andrus*, the District of Columbia Circuit held that the approval of a permit authorizing an outdoor Mass conducted by Pope John Paul II on the National Mall did not violate the Establishment Clause. In making this decision, the court placed great weight on the government's decision to treat religious and secular speech equally in a public forum.

> Religious and non-religious groups and events are treated alike. No "preference" is present. This undercuts appellants' establishment claim. When the National Mall is, as a matter of established policy, openly available on a non-discriminatory basis to the Pope, to the Reverend Moon, to Madalyn Murray O'Hair, and to all others (religionists and anti-religionists), there is no "establishment of a religion," and there cannot be a meaningful perception of one.

613 F.2d at 934. Although *Andrus* was decided before the Supreme Court adopted the endorsement test, the plaintiffs anticipated the test and argued that allowing the Mass implied government support for Catholicism. The *Andrus* court strongly rejected this argument.

> Appellants say that the government permit for this occurrence on the renowned National Mall sends an implied message--to the nation and to the world--of government approval (and therefore "establishment") of this church service. *It implies no more approval for this church than for any other group using the Mall. The message that it does send to the world is approval of the principle of freedom of demonstration, for all groups, for all religions, even for those opposing religion.*

613 F.2d at 936 (emphasis added). Furthermore, unlike the menorah in this case, which places no net cost upon Grand Rapids, the outdoor mass forced the government to spend over $100,000 for crowd control and other functions. Even this large expense did not create an Establishment Clause violation. "[I]t is an important function of government to permit such large assemblies . . . . Provision of police, sanitation and related public services is a legitimate function of government and not an 'establishment' of religion." *Ibid.*

*Andrus* conclusively demonstrates the importance of a policy of equal access for all in traditional public fora. The leader of one of the world's largest faiths and 500,000 of his followers take over the National Mall, an area positively reeking with national and governmental symbols visible from every line of sight. Yet the *Andrus* court did not worry about how close the Pope would be to the Capitol building, whether the Catholic Church posted sufficiently large disclaimer signs, or whether the government ensured that the Mass took place in a "secular" context. Once the court established that the Pope celebrated the Mass pursuant to a policy of equal access, the case was settled.

The court does not openly disagree with *Andrus*; it merely asserts that *Andrus* does not apply because this case "is not concerned with Chabad House's right to conduct candlelighting services on Calder Plaza each evening during Chanukah." Maj. Op. at 17. Apparently the court believes that the *Andrus* court limited its holding to religious services. But the court clearly intended its ruling to apply to all religious speech. "The government may not allocate access to a public place available for communication among citizens on the basis of the religious content of the messages." *Andrus*, 613 F.2d at 935 (footnote omitted). In fact, *Andrus* relied heavily upon *Fowler v. Rhode Island*, 345 U.S. 67, 73 S. Ct. 526 (1953), which upheld the first amendment right of Jehovah's Witnesses to address religious meetings in a public park. Thus, *Andrus* clearly involved religious

*speech*, not just religious *services*; it deserves more serious treatment by the court.

The *Andrus* decision does not stand alone; recent Supreme Court rulings also place great reliance on equal access policies in Establishment Clause law. In *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981), the Court held that a state university that generally makes its facilities available to student groups cannot close those facilities to student religious groups. The Court explained the distinction between allowing religious speech and endorsing that speech as follows:

> [A]n open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. As the Court of Appeals quite aptly stated, such a policy "would no more commit the University . . . to religious goals" that it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.

454 U.S. at 274, 102 S. Ct. at 276 (citation and footnote omitted). The *Widmar* Court also emphasized that many non-religious groups were eligible to use school facilities; "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect." 454 U.S. at 274, 102 S. Ct. at 277; *see also Wolman v. Walter*, 443 U.S. 229, 240-241, 97 S. Ct. 2593, 2601 (1977).

The Court expanded this finding in *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 110 S. Ct. 2356 (1990). *Mergens* upheld the Equal Access Act, which requires schools to give student religious groups the same access to facilities as other non-curriculum related student groups. Justice O'Connor, writing for the plurality, rejected the claim that this Act's primary effect was to advance religion:

> [T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

110 S. Ct. at 2372 (citations omitted) (emphasis in original). The *Mergens* plurality also recognized that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 110 S. Ct. at 2371.

Several recent cases demonstrate the broad sweep of the equal access doctrine promulgated in *Mergens*. In *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990), the Third Circuit affirmed an injunction requiring a high school to grant access to religious groups for discussion and worship services. In *Berger by Berger v. Rensselaer Cent. Sch. Corp.*, 766 F. Supp. 696 (N.D. Ind. 1991), a district court upheld a school's policy of permitting religious organizations to distribute religious literature in fifth-grade classrooms. "Permitting the local Gideons to circulate [Bibles] in public school classrooms is no more an endorsement of Christianity than allowing little league baseball to disseminate its materials endorses the national pastime." 766 F. Supp. at 706.

In *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704 (M.D. Ala. 1991), a district court granted a preliminary injunction to plaintiffs seeking to require a school board to allow a church to rent its high school auditorium to conduct a baccalaureate service for graduating seniors. This case is quite telling, since the relationship between the school and the

baccalaureate was much closer than any connection between Grand Rapids and Chabad House. "[U]ntil only two years ago, Verbena High School itself had, by longstanding tradition, conducted a similar religious 'baccalaureate service' for its graduating seniors in this very locale, and . . . several officials at Verbena High School . . . have contributed somewhat to an appearance that the school is connected with this year's Church-initiated service." 765 F. Supp. at 712. Nevertheless, the court concluded that the Establishment Clause did not require the school board to deny church groups the use of its auditorium. Instead, it simply required the board and the school "to take steps to disclaim any official connection to the event in their communications with students, parents, school employees, and other members of the community." *Id.* at 713 (footnote omitted). Finally, in *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991), a district court denied a preliminary injunction to a student and her father who sought to prevent a high school from leasing its auditorium to a non-denominational study group for a baccalaureate service.

These cases demonstrate that an equal access policy weighs very heavily in determining whether an endorsement of religion has occurred. Remarkably, the court attempts to distinguish them by suggesting that religious speech should receive more protection in public schools than in a public forum.[7] Apparently, the court believes that school children are more capable of evaluating religious speech accurately than the citizens of Grand Rapids. Such a belief disregards important precedent and violates common sense. The fact that these

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[7] "The whole purpose of a school or university is to deal in ideas, impart information and stimulate thoughtful discussion. Any 'incidental benefit' to a religious group from being permitted to use school facilities for its meetings would not offend the second prong of the *Lemon* test. The primary effect would have been to further the school's reason for being. . . . The mission of a public school or a public university is the promotion of free exchange of ideas and nothing about the use of its facilities for discrete religious discussions sends a signal of endorsement." Maj. Op. at 21-22.

cases involve schools rather than public areas demonstrates the *breadth* of their holdings, not their narrowness. Schools are not traditional public fora, and governments have much broader power over student speech than other types of private speech. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 108 S. Ct. 562, 567 (1988) (citation omitted). Moreover, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Students in such institutions are impressionable and their attendance is involuntary." *Edwards v. Aguillard*, 482 U.S. 578, 583-84, 107 S. Ct. 2573, 2577 (1987). "The Supreme Court has emphasized that the avoidance of religious divisiveness is nowhere more important than in public education, for '[t]he government's activities in this area can have a magnified impact on impressionable young minds. . . .'" *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1072 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1029 (1988) (Kennedy, J. concurring) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 383, 105 S. Ct. 3216, 3222 (1985)). An article written in 1986, four years before *Mergens*, noted that "[i]n every public school case, except one, where establishment has been alleged, the [Supreme] Court has struck down the challenged practice." William P. Marshall, *"We Know It When We See It" The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495, 541 (1986) (footnotes omitted).[8]

Thus, if the Supreme Court allows an equal access policy for religious speech in schools, it would certainly uphold an city's decision to grant equal access to a traditional public forum for all citizens. A reasonable

[8]The sole exception was *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679 (1952), in which the Court upheld a New York statute that allowed students to be released from public school to attend religious services or classes.

observer who did not find endorsement in religious groups' use of school facilities would be hard-pressed indeed to find it in Chabad House's use of Calder Plaza. It would seem far more likely that those who worry about religious influence over students would be much less concerned about religious activity in the Plaza, since they know that all sorts of groups speak there. Surely the court does not believe that *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962), which prohibits prayer in public schools, can be used to prohibit prayer in public parks. Public schools may exist to provoke controversy and breed discussion, but public fora obviously have the exact same purpose. In fact, they exist solely to provide a platform for speakers of all kinds.

The court also attempts to distinguish *Widmar* and *Mergens* on the grounds "that the empty classrooms that remained after the religious clubs had finished their meetings contained no religious symbols from which a 'reasonable observer' could infer an endorsement of religion by the university or high school authorities." Maj. Op. at 18. It also suggests that while a candlelighting ceremony in Calder Plaza would be acceptable, an unattended menorah might mislead a reasonable observer into believing that the government was speaking rather than a private group.[9] But this argument is severely flawed. As noted above, *Widmar* and *Mergens* are not strictly limited to their facts. Instead, they represent a broad policy of tolerance for equal access policies in Establishment Clause jurisprudence.

The court's distinction also seems to rest on the assumption that the menorah constitutes only a "religious

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[9]Opponents of any display could easily make the contrary argument when necessary. For example, the former mayor of Beverly Hills, opposing "the ceremonial lighting of a 27-foot menorah . . . at a city park" objected mightily because "the event was distinctly religious . . . . something like a Jewish revival meeting . . . . It makes it appear that the city was taking part in the religious ceremony . . . ." L.A. Times, Jan. 11, 1987, part 9, at 1.

symbol" that remains after Chabad House has finished its speech. But this assumption is wrong; Chabad House's menorah display is no mere remnant of religious speech, it *is* religious speech and must receive the same respect as a round-the-clock Bible reading. What real purpose would be served by forcing Chabad House to stand constant watch over its menorah in order to defeat an Establishment Clause challenge?[10] I find it incomprehensible that a reasonable observer could find *more* endorsement in a menorah standing alone than in a menorah accompanied by a Torah reading or by crowds of people celebrating Chanukah with games or feasts. Therefore, the court must acknowledge that the menorah display constitutes religious speech just as much as a meeting of a school Bible club or a Mass presided over by the Pope. Once this is granted, than this case must be governed by *Andrus*, *Widmar*, or *Mergens*.

Furthermore, the court forces Chabad House's freedom of speech to depend on the actions of third parties. Imagine that instead of standing alone, the menorah was surrounded by a number of other displays representing a broad spectrum of views. Under such circumstances, the court seems to imply, a reasonable observer could see that Chabad House's display represents just one voice among many who are entitled to speak in Calder Plaza.[11] Yet why should Chabad House's rights to speak depend on the actions of others? As the court acknowledges, the only reason that the menorah stands alone is that "the City has received no other requests for permits during that season." Maj. Op. at 3. The record conclusively demonstrates that

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[10]This has been done in some locations. In Seattle, a law suit against a Lubavitch menorah on city property was settled when it was agreed that "a member of the Jewish group will be at the menorah during daylight hours. . . ." UPI BC cycle, Dec. 5, 1985.

[11]"The combination of the menorah's size, its location, and *the fact that it stood in 'splendid isolation'* except for the pervasive presence of government buildings and unattended except for one-hour daily services, all added to its appearance of permanence and of endorsement as found by Judge Enslen." Maj. Op. at 25 (emphasis added).

neither Chabad House nor Grand Rapids has sought to discourage other displays. However, this is simply not enough for the court, which refuses to protect the rights of Chabad House until it has convinced at least one other group to erect a display during Chanukah. It makes no sense to rule that Chabad House can speak if others will speak as well, but that the others can veto Chabad House's freedom of speech by abstaining from speech.

I wish to emphasize that I agree with the court that the fact that the menorah stands unattended for most of eight days may have *some* effect on our conclusion as to whether Grand Rapids has endorsed religion. However, in this case, that fact is simply overwhelmed by Calder Plaza's status as a traditional public forum. The court apparently contemplates an observer who sees a shift in city policy with each new speaker that enters the Plaza. Such an attitude is patently unreasonable. To a *reasonable* observer, no display ever really stands alone in a public forum. In the mind's eye, the reasonable observer sees the menorah display as but one of a long series that have taken place since the Plaza was opened. The reasonable observer knows that other speakers have used the Plaza before, and will do so again. Instead of concluding that the religious zealots have stormed the gates with the endorsement of the city, the reasonable observer recognizes this display as yet another example of free speech.

Thus, the court simply fails in its attempt to distinguish *Andrus*, *Widmar*, and *Mergens*. Having brushed over these cases, however, the court chooses instead to rely upon *Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990). In *Smith*, a 2-1 majority of the Fourth Circuit held that a creche erected by Jaycees on the front lawn of a county office building violated the Establishment Clause. However, there are several significant differences between that case and this one. The *Smith* display was approved by a special vote of the County's Board of Supervisors, rather than being allowed pursuant to a long-established policy like the

menorah in this case. Unlike Calder Plaza, which regularly features all types of activities, the lawn in *Smith* had been used only "sporadically for occasional activities. . . . " 895 F.2d at 955. In fact, although the *Smith* court treated the lawn as a traditional public forum, it acknowledged that "[t]he front lawn though used for such events as weddings and concerts does not have the traditional indicia of a free speech forum associated with a public park." 895 F.2d at 958 n.5. Because we must consider all the facts in each case and avoid drawing false parallels, these distinctions are significant. Citizens of Grand Rapids have become accustomed to the free use of Calder Plaza and should know that events taking place there are not necessarily supported by the city. The county lawn in *Smith*, on the other hand, was rarely used for such events, which could have made the county's citizens more likely to draw a connection between those who spoke on the lawn and those who allowed them to speak. Because the endorsement test places great weight on the perception of the speech in question, this distinction could easily justify different results in *Smith* and this case.

Moreover, *Smith* was decided on February 8, 1990, several months before the Supreme Court announced its holding in *Mergens*. Thus, the Fourth Circuit did not know of Justice O'Connor's opinion in which she emphasized the "crucial" distinction between government speech and private speech. Considering that Justice O'Connor originated the endorsement test, her statement might have caused the Fourth Circuit to act differently. However, even if *Smith* were exactly on point with this case, I believe that the *Smith* court simply committed the same error as this court by minimizing the importance of an equal access policy. Rather than repeating that error, we must avoid it.

The court also mentions *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990), a case given great weight by the district court. In that case, the Second Circuit rejected an

unattended, solitary display of a large menorah in City Hall Park. It rejected the public forum argument made here, because it feared that "the public forum doctrine would swallow up the Establishment Clause." *Id.* at 1029. Furthermore, it noted that "[o]ther than the menorah in question, no permits had been issued for the unattended display of any religious symbol in the Park." *Ibid.* It also argued that "[t]he existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." *Ibid.* Judge Meskili dissented, arguing that the case should be governed by *Widmar v. Vincent*. The Second Circuit later re-affirmed its decision in a case involving the same parties and only slightly different facts. *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3208 (U.S. Sept. 19, 1991) (No. 91-468).

Considering the similarity between the facts in *Kaplan* and this case, it may seem surprising that the court chooses to describe *Smith* as the "closest case on the facts" to this one. Maj. Op. at 18. However, the majority is wise not to rely upon *Kaplan*, as it has been criticized heavily by this court on several occasions. In *ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1102 (6th Cir. 1990), this court stated that "Judge Meskill's dissent [in *Kaplan*] strikes us as persuasive. . . ." In an earlier stage of this case, this court specifically endorsed Judge Meskill's reasoning. *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 309 (6th Cir. 1991) ("On our tentative view of the merits, we believe Judge Meskill had it about right. . . .") Finally, in *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 462 (6th Cir. 1991), this court noted that "in the [Grand Rapids] case we stated that we did not believe that [*Kaplan*] was the law in our circuit." Thus, in three separate cases, this court has indicated its general disagreement with *Kaplan*. Furthermore, in light of the above discussion of *Widmar* and *Mergens*, it is clear that *Kaplan* simply misconstrues the endorsement test.

The court fails to discuss *Grutzmacher v. Public Bldg. Comm'n of Chicago*, 700 F. Supp. 1497 (N.D. Ill. 1988), in which plaintiffs attempted to erect religious displays in Chicago's Daley Center Plaza. This plaza surrounds the Daley Center, which houses a number of city administrative and county judicial functions. The mayor's offices and the City Council are across the street from the Daley Center in the old City Hall. The Public Building Commission determined to ban all religious exhibitions during the December holiday season, and attempted to justify this decision on the basis of the Establishment Clause. The district court, ruling in favor of the plaintiffs, rejected this argument:

> The Commission's fear of violating the Establishment Clause completely misses the point under the circumstances of this case. The Commission has shown no compelling interest to justify the prohibition of any religious holiday symbols on the plaza or to discriminate between one religion and another or to discriminate between all religionists and non-religionists. To say "none" is as repressive as it is unconstitutional.

700 F. Supp. at 1502. The district court also emphasized that the religious displays were protected by the free speech clause of the first amendment. Thus, it granted an injunction requiring the city to provide the use of Daley Plaza to the plaintiffs "without discrimination and without regard to the content of the expressions, religious or otherwise. . . ." *Id.* at 1503.

Because the court allows relatively minor factors to outweigh the protection given to private speech and the Supreme Court's respect for equal access policies, it concludes that a twenty-foot cross erected during by a private group in Calder Plaza during Holy Week "would surely be found to be an endorsement of [Christianity]." Maj. Op. at 25. However, an actual reasonable observer would apply the same common sense understanding to that example or to other similar uses of the Plaza. Thus, we

*should* uphold the constitutionality, under Grand Rapids's policy, of the use of Calder Plaza for a twenty-foot high cross during Holy Week, a twenty-foot high "No Religion" button, or, indeed, a twenty-foot high representation of Andre Serrano's government-funded sculpture, "Piss Christ," consisting of a crucifix immersed in the artist's urine.[12] I find it absolutely inconceivable that a reasonable observer would find *no* endorsement, support, or promotion of *anti-religious* sentiment in the government's decision to fund Mr. Serrano's work, yet would find it in the equal application of Grand Rapids's traditional public forum policy to a minority religious group.

I also wish to emphasize that my opinion rests on principle, and is not bound by a narrow reading of these particular facts. For example, I find no constitutional significance in whether the expressive speech is by a group that represents the majority, such as the hypothetical cross; a largely respected minority group, as with the menorah in this case; or a largely despised

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[12]Of course, I would not hold that a government must allow all private speakers to speak in any manner whatsoever in a public forum. "[T]he government may enforce reasonable time, place and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 1707 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983)). Thus, Grand Rapids could probably, if it chose, limit the height or length of time of displays or rallies, or even ban unattended displays, if done evenhandedly. *See Chabad Lubavitch of Ga. v. Harris*, 752 F. Supp. 1063 (N.D. Ga. 1990) (state policy prohibited placement of any object on state capitol grounds by members of the public); *Lubavitch of Iowa, Inc. v. Walters*, 684 F. Supp. 610 (S.D. Iowa 1988), *aff'd*, 873 F.2d 1161 (8th Cir. 1989) (requiring plaintiffs to remove menorah at close of services was consistent with state policy that there be a thorough cleanup after event is concluded); *Congregation Lubavitch v. City of Cincinnati*, No. C-1-90-844, (W.D. Ohio Dec. 11, 1990), *stay denied*, 923 F.2d 458 (6th Cir. 1991) (injunction ordering Cincinnati to allow a menorah in a public square, but directing the parties to negotiate an agreement as to the size of the menorah for safety reasons; parties eventually agreed on a ten-foot-high menorah, reduced from eighteen feet).

minority group, as with the Serrano sculpture mentioned earlier. A reasonable observer would understand that such considerations are trivial compared with the importance of the traditional public forum doctrine. Tricky questions could arise if there is a claim that the public forum has not been open equally, that an ostensibly neutral restricting criterion actually discriminates, or that there is some government collusion in an ostensibly private display. But this case presents an honest, neutral, straightforward application of the traditional public forum doctrine. I do not claim that the traditional public forum doctrine automatically trumps the Establishment Clause. Rather, I simply maintain that private religious expression in a legitimate public forum cannot possibly be seen as endorsement by a reasonable observer.

We must remember, when applying the endorsement test, that the reasonable observer is "objective." *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711, 105 S. Ct. 2914, 2918 (1985) (O'Connor, J., concurring). Thus, the reasonable observer does not look upon religion with a jaundiced eye, and religious speech need not yield to those who do. An observer who thinks that religion "should stay in the churches, synagogues and mosques, where it belongs," may have a reasonable point of view; but this opinion would not make a factual observation of government endorsement in this case reasonable. The same observer might reasonably be offended by symbols of a group he abhors, but again this does not make reasonable the belief that the government is endorsing that view. In exactly the same way, a government does not endorse a view expressed in a student's article in a state university newspaper, an essay by a tenured professor at a state university, or a speech by a student on a government scholarship. The menorah display in Calder Plaza can be seen as an endorsement only by a determinedly unreasonable observer. By agreeing with this unreasonable observer, the court fails in its duty to preserve Chabad House's right to religious speech, and gravely weakens freedom of speech.

Great defenders of free speech, such as Professor Harry Kalven, have written of the dangers to free speech posed by the "Heckler's Veto," an attempt by those who dislike a speaker to create such a disturbance that the speaker must be silenced.[13] By and large, however, the courts have recognized that we cannot allow the right of free speech to be restricted based on the hostile reaction of those who disagree with it. "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence." *Brown v. Louisiana*, 383 U.S. 131, 133 n.1, 86 S. Ct. 719, 719 n.1 (1966).

In this case, we again have a challenge to the right of free speech from those who do not like the message at issue or the manner it which it is presented. Unfortunately, by failing to recognize how unreasonable this attitude is under the facts of this case, the court presents a new threat to religious speech in the concept of the "Ignoramus's Veto." The Ignoramus's Veto lies in the hands to those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine. The court has obviously relied upon a "reasonable observer" who knows nothing about the nature of the exhibit -- he simply sees the religious object in a prominent public place and ignorantly assumes that the government is endorsing it. Important constitutional issues should not be decided on such a basis.

V

By itself, the court's misunderstanding of the endorsement test fatally undermines its decision. But this

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[13]For an excellent discussion of this concept, *see* Harry Kalven, Jr., The Negro and the First Amendment 140-60 (1965).

opinion presents other serious problems. By failing even to contemplate how much weight should be given to which facts, the court has created serious Establishment Clause problems of its own. Any government, or any court, that attempts to modify an equal access policy to place differential restraints on certain religious expression will become hopelessly entangled with religion, and cannot avoid supporting some religious groups at the expense of others.

A

One important aspect of the *Lemon* test prohibits "excessive government entanglement with religion." This requirement derives from *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 90 S. Ct. 1409 (1970), in which the Supreme Court upheld a New York statute exempting real property owned by religious organizations from property tax. However, the Court noted concern that government and religion not grow too closely involved with one another:

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, *could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards*, but that is not this case.

397 U.S. at 674-75, 90 S. Ct. at 1414 (emphasis added). In *Lemon*, the Supreme Court used the entanglement test to strike down a Rhode Island program of salary

supplements paid to teachers of secular subjects in non-public schools. It concluded that the state could never prevent such aid from being used to promote religion without excessive involvement in religious affairs:

> A comprehensive, discriminating, and continuing state surveillance will inevitably be required. . . . [A] teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

*Lemon v. Kurtzman*, 403 U.S. 602, 619, 91 S. Ct. 2105, 2114 (1971). Thus, this court must ensure that government and religious groups avoid being too tightly connected, and do not spend too much time regulating each other.

Instead of avoiding this problem, however, the court's decision actually creates it. Consider the process adopted by the court to determine whether Chabad House's menorah display can be allowed. If it is faithful to the court's opinion, Grand Rapids must determine where the menorah can stand, its size, the appropriate number and size of disclaimer signs, any net costs generated by the display, the number and importance of government buildings in the area, whether other displays will be nearby, the size of these other displays, and whether they have any connection to the menorah.

Furthermore, the city must decide whether the display has any secular overtones, which requires it to interpret Judaism and its role in modern American life. Finally, it must consider the history of Calder Plaza, its role in city life, and the likely impact of the display on the citizens of Grand Rapids; these questions require the city to make decisions regarding the religious views of its citizens. These factors are just a few of the issues that the court, in

effect, requires local governments to measure before issuing to a religious group a permit available to all other forms of speech. Such a rule will force religious groups to submit their proposals to extensive government scrutiny, as well as forcing governments to make explicitly religious decisions. If a local government fails to weigh these requirements properly, the court places this responsibility on judges.[14] But the rule against entanglement clearly prevents any branch of government from requiring religious groups to answer such specific questions, and from making such specific decisions regarding religion.

B

Furthermore, the fact-specific inquiry mandated by the court has the pernicious effect of aiding some religious groups at the expense of others. The court seems to imply that its decision would be different if the Pope wished to celebrate a Mass in Calder Plaza, or if Chabad House sought merely to hold candlelighting services there. By extension, the court seemingly would allow a song service featuring Amy Grant, a sermon preached by Louis Farrakhan, or an ecumenical prayer service. But surely this constitutes the sort of discrimination among various religious groups that the Supreme Court has condemned time and time again. Government "may not . . . promote one religion or religious theory against another or even against the militant opposite." *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968); *see also Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305, 83 S. Ct. 1560, 1615 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires

[14] As an example, a Superior Court judge in Los Angeles ruled that a menorah could be displayed in City Hall, but could not be lighted, because that "was a religious ceremony forbidden in taxpayer-owned buildings." L.A. Times, Dec. 7, 1985, at 36. This decision was upheld on appeal. *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (1989). The following year, a similar display was permitted, with Judge Robert O'Brien holding that the display did not imply city sponsorship of Judaism. (Case No. C577925). UPI PM cycle, Dec. 19, 1986.

that government . . . effect no favoritism among sects or between religion and non-religion"); *Everson v. Board of Educ. of Ewing Township*, 330 U.S 1, 18, 67 S. Ct. 504, 513 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them").

The court commits this error because it fails sufficiently to appreciate that the display of a menorah throughout the eight days of Chanukah transmits a specific message that cannot be sent any other way. Certainly, Chabad House could send a *similar* message, perhaps through rallies or speeches that the court would allow; but it has chosen to use a particular means to convey a particular thought. As Chabad House is speaking pursuant to an equal access policy, this court cannot and should not overrule that choice. The defendant in *Texas v. Johnson* could have conveyed a similar message without burning a flag; but the Supreme Court held that he could deliver his message in his way. 491 U.S. at 416 n.11, 109 S. Ct. at 2546 n.11; *see also Schneider v. New Jersey*, 308 U.S. 147, 163, 60 S. Ct. 146, 151 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"). This court should follow that example.

The court's failure to do so is particularly disturbing because this case involves religious communication, and the court implies that religious speech that features talking or regular services merits more legal protection than other methods of expressing religious truth. This implication represents a paltry and prejudicial interpretation of religion. Menorahs, prayer wheels, and crosses are but a few of the many symbols loaded with religious meaning. To many people, the sight of these symbols conveys their faith with more power and poignancy than any spoken word. This fact should not surprise us; consider the crowds that flock to such secular symbols as Mount Rushmore and the Washington Monument, or the controversy engendered by the display of a Confederate flag at the Alabama capitol. *See NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990). The courts have long

recognized the broad nature of religious expression, and have carefully avoided ruling that certain forms of communication are better than others. The court, however, not only shows substantial prejudice against symbolic speech, but actually claims that the Constitution requires such prejudice. I cannot join this blatant and unnecessary favoritism for some religious expressions at the expense of others.

Certainly, the endorsement test requires difficult line-drawing, and often requires courts to analyze complex fact patterns. But by recognizing that private speech in a traditional public forum is very unlikely to violate the Establishment Clause, the court could drastically reduce the uncertainty so rampant in this area of the law. Such a rule would not ignore the factual inquiry mandated by the endorsement test; it would simply acknowledge that certain facts are more important than others. Instead, the court chooses to treat the private nature of Chabad House's display and the city's equal access policy as though these facts carried only minimal importance. Thus, it concludes that all displays must be subjected to minute scrutiny, and that courts must spend enormous amounts of time quibbling over relatively minor details.

## VI

I strongly disagree with the court's definition of a "reasonable observer," its refusal to pay sufficient heed to the city's equal access policy, its requirement that local governments entangle themselves with religious groups, and its decision to favor certain forms of religious speech over others. However, even if I agreed with the court's outcome, I could not concur in its vague, ill-defined opinion, which provides less guidance than the infamous "chancellor's foot."[15] By merely listing a number of

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[15]This expression comes from a seventeenth-century statement regarding the unpredictable nature of equity:

> Equity is a roguish thing. For law we have a measure, know what to trust to. Equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is

factors while refusing to explain the importance of any of them, the court has left a morass in which no district court can find its way.

Consider, for example, the famous disclaimer signs. The court concludes that the signs "cannot be held sufficient" to defeat the message that Grand Rapids supports religion. Maj. Op. at 24. The court bases this conclusion on its perception that few people can read the signs and that the large menorah at issue requires a more stringent or intrusive disclaimer than the stable in *ACLU of Ky. v. Wilkinson*, 895 F.2d 1098, 1102 (6th Cir. 1990). Evidently, the court silently assumes the existence of some complex formula involving the size, location, and legibility of disclaimers, as well as the nature of the display in question. But it never expresses this formula, and never indicates how much weight should be given to each factor. By doing so, it leaves the door open for many cases that must follow.

Chabad House is clearly determined to present its views through menorah displays, and is also willing to defend its legal rights.[16] *See, e.g., Congregation Lubavitch v. City*

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equity. 'Tis all one as if they should make the standard for the measure we call a foot, to be the chancellor's foot; what an uncertain measure this would be. One chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the chancellor's conscience.

**Table of Talk of John Selden**, "Equity," 43 (F. Pollock ed. 1927).

[16]Various Lubavitch spokesmen have emphasized the relation of their religious beliefs and their public expression. Rabbi Teldon has stated that "[t]he basic motivation is [that Chanukah is] the only Jewish holiday where there's a specific tradition to publicize amongst all nations of the world the beauty and miracle of the lamps that symbolize the victory of religious freedom over political tyranny." Newsday, Dec. 21, 1989, at 21. Rabbi Shemtov, discussing the display of a menorah in a park opposite the White House, explained that "[t]he lighting of candles at Hanukah is the one observance in the Jewish religion where public display is not just an ingredient of the observance but its very essence." Wash. Post, Dec. 23, 1984, at C1. Discussing a display of a menorah in the Wisconsin State Capitol, Rabbi Matusof stated that "[o]ne of the points of Hanukkah is to publicize a miracle and a public menorah is a place for public opinion. UPI BC cycle, Dec. 14, 1987. Finally, Rabbi Flamer recently

*of Cincinnati*, 923 F.2d 458 (6th Cir. 1991); *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990); *Lubavitch of Iowa, Inc. v. Walters*, 808 F.2d 656 (8th Cir. 1986); *Chabad-Lubavitch of Vt. v. City of Burlington*, 754 F. Supp. 372 (D. Vt. 1990), *aff'd*, 936 F.2d 109 (2d Cir. 1991), *petition for cert. filed*, Sept. 19, 1991 (No. 91-468); *Chabad Lubavitch of Ga. v. Harris*, 752 F. Supp. 1063 (N.D. Ga. 1990); *Grutzmacher v. Public Building Comm'n of Chicago*, 700 F. Supp. 1497 (N.D. Ill. 1988); *Lubavitch of Iowa, Inc. v. Walters*, 684 F. Supp. 610 (S.D. Iowa 1988), *aff'd*, 873 F.2d 1161 (8th Cir. 1989). It could well file multiple applications for every combination of smaller menorahs and larger signs.

How should courts rule on a ten-foot menorah with a three-foot sign, a four-foot menorah and a one-foot sign, or a twenty-foot menorah with a thirty-foot sign? As for legibility, most people will likely never bother to read disclaimers anyway. What is the standard? What persons can read, if they choose to go up to the sign? What twenty percent of the people will read? What ninety-nine percent of the people could read from a speeding car? Furthermore, the menorah is downtown, where traffic moves at a relatively slow pace. What if it were on an interstate? Would larger signs be needed? Would a series of signs, like the old Burma Shave ads, be necessary?[17] Must disclaimers be in alternate languages for those who do not read English? Must there be a recording for those who can understand the symbol but cannot read? If so, how loud must it be? To state these questions is to demonstrate the silliness of using the disclaimer signs as a factor without even trying to explain how this factor should be interpreted.

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described a menorah display as "an expression of religious freedom, of joy that we, as Jews, who have been persecuted for so long, are free and able to celebrate our holiday. N.Y. Times, Dec. 8, 1991, § 12WC, at 2.

[17] *E.g.*, "By letting this/ Menorah sit/ We don't in any/ Way endorse it./ Grand Rapids."

The court cannot answer these criticisms simply by invoking the disclaimer in *Wilkinson*. The stable at issue in that case was erected by the Commonwealth of Kentucky, and therefore constituted speech sponsored by the government, rather than private speech permitted by the government. Furthermore, the disclaimer sign in *Wilkinson* was specifically ordered by the district court, which required that it be "in letters big enough to be read from an automobile passing on the street before it," and further specified much of the language used in the sign. Moreover, the district court in *Wilkinson* retained jurisdiction over the case to ensure that the Commonwealth complied with its order. 895 F.2d at 1099-1100. Thus, in *Wilkinson*, this court could confidently assume that the district court had considered all of the questions raised above, and was designing rules to fit that precise case. Here, no such finding has been made. Instead of explaining exactly what type of disclaimer would be appropriate, the court and the district court simply find the proposed disclaimers invalid. Since the court implies that some type of disclaimer would be sufficient, it should at least require the district court in this case to follow the example of Wilkinson and determine a proper disclaimer.

Even if the court fully defined proper disclaimer signs, an entire host of questions would remain. The court mentions the menorah's size, the length of time it is to be displayed, and its relationship to other buildings. Each of these factors raises dozens of questions, and the court provides no approach to an answer to any of them. All we can really say is that the majority of *this* panel is uncomfortable with *this* display. Conceivably, Chabad House and the plaintiffs could battle for years over the display, with slight changes being made each year, until this court issues a conclusive ruling. This possibility alone proves the failure of the court's opinion.

The court contends that "[t]his is a close case," Maj. Op. at 17, and it could attempt to defend the vagueness of its opinion on the grounds that hard cases create bad law.

But the court's opinion is a case of bad law that will create worse law. By ignoring the significance of Grand Rapids's equal access policy, it leaves courts and governments to wander in a maze of vague, relatively minor facts. It promotes certain religious speech at the expense of others, and rests its decision on the specific facts of this case that may never be repeated, all because of its failure to give full weight to the traditional public forum doctrine. The court can save itself only by acknowledging a firm distinction between speech the government permits and speech the government supports.

## VII

The court's decision contravenes Establishment Clause precedent as well as common sense. It prevents Chabad House from engaging in the free speech that the first amendment guarantees. It forces local governments to pry into the decisions of religious groups, all in the name of a "reasonable observer" who does not and cannot exist. By doing so, the court has clearly misread the law surrounding the Establishment Clause. Perhaps even more seriously, it has violated the spirit of that law. In the case of *Illinois* ex rel. *McCollum v. Board of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 68 S. Ct. 461 (1948), Leo Pfeffer, a great defender of the separation between church and state, filed a landmark amicus brief that seemed to have a strong effect on Justice Black's opinion for the court. In it, Mr. Pfeffer argued that

> We regard the principle of separation of church and state as one of the foundations of American democracy. Both political liberty and freedom of religious worship and belief, we are firmly convinced, can remain inviolate only when there exists no intrusion of secular authority in religious affairs. As Americans and as spokesmen for religious bodies . . . we therefore deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms that wall was intended to protect.

This argument was reflected in Justice Black's opinion for the Court: "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum*, 333 U.S. at 212, 68 S. Ct. at 465.

What the members of Chabad House seek in this court is fully consistent with, and does not violate, the principle so powerfully stated in *McCollum*. They are not interfering in city functions, or trying to bend the city to their will. Rather, as full-fledged American citizens, they are asking for their equal rights. They seek nothing that this court would not readily compel the city to grant to any secular group. They merely ask that they not be spurned because they choose to praise God. When it granted Chabad House's permit, Grand Rapids stayed firmly on its side of the wall separating church and state. It acted merely as the referee and arbiter of the public space, rather than becoming a participant or combatant in the melee of ideas and expression that characterizes America at its best. This court should applaud such actions, not censure them. As Justice Brennan has stated:

> The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously diverse lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.

*McDaniel v. Paty*, 435 U.S. 618, 642, 98 S. Ct. 1322, 1336 (1978) (Brennan, J., concurring).

The court has also failed to grasp the spirit of the endorsement test. Government endorsement of religion, according to Justice O'Connor, "sends a message to

nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 1367 (1984) (O'Connor, J., concurring). Thus, in applying this test, we must remember that it seeks to guarantee that *all* Americans, no matter their beliefs, can feel at home here.

For small religious groups, such as Chabad House, feeling at home in America can be difficult. These groups may not have the money to erect vast temples or cathedrals, or to fund large broadcasting facilities. They may find it difficult to attract the attention of their fellow men. But instead of forcing these groups to remain on the sidelines, our Constitution offers them a platform from which to proclaim their message. In the traditional public forum, as at the ballot box, all citizens are insiders as they seek to influence our civic life.

By displaying the menorah in Calder Plaza, the members of Chabad House believe they can proclaim their full participation in public life, and can feel that in this country, they need not be permanent outsiders. In particular, the menorah display is, for some, a symbol of precisely the equal and "non-outsider" status that the public forum accords to all. Many Jewish writers have noted the result of the pervasive symbolism of the Christmas season. "The Christmas season is a difficult one for many Jews. . . ." **Tikkun**, Mar./Apr. 1992, at 58. "Christmas tends to be lonely for Jews. . . . Here's this day that belongs to everybody else. . . ." Warren and Rebecca Boroson, *Coping with Santa Claus*, **Jewish Living**, Nov./Dec. 1979, at 31.

A Lubavitch representative, Rabbi Shmuel Kaplan, eloquently and explicitly stated,

> the underlying motivations for the erection of public menorahs are:

> --The desire to increase the awareness of Chanukah among Jews, especially among the young, and to instill in them a sense of pride in their Jewish heritage;
> --The intention to convey to the American public the universal message of religious liberty and freedom personified by Chanukah and symbolized by the menorah; and
> --The resolve to give Jews a feeling of equality for themselves and Judaism in this country.

**Wash. Jewish Week**, July 20, 1989, at 5. Rabbi Kaplan has also said, "Can anyone calculate the impact and the sense of pride and identity for a Jewish child (or adult, for that matter) who is surrounded by the 'Christian' holiday spirit when he or she sees a menorah in a public setting?" **Wash. Jewish Week**, Jan. 1, 1987, at 10.

Some, perhaps most, oppose this view, on theological or practical grounds.[18] But Chabad House's right to be heard on equal terms with any other group, whether the exercise of that right is wise or unwise, represents a

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[18]For example, Rabbi Teretski has stated that "[P]ublic parks are not appropriate places for the display of religious items and symbols. . . . There is a certain modesty, a private feeling, which I think should be associated with the holiday." N.Y. Times, Dec. 8, 1991, § 12WC, at 2. Rabbi Winer, discussing a proposed menorah display in White Plains, New York, declared, "I am unalterably opposed to the erection of any religious symbols on public property. . . . I believe that the overwhelming majority of Jews in White Plains and virtually all of the rabbis agree with me on this." N.Y. Times, Dec. 3, 1991, at B6.

Laypersons have evinced a similar attitude. Referring to a large menorah placed in Lafayette Park, across from the White House, Marc Stern of the American Jewish Congress stated, "It's unconstitutional. Most of the organized Jewish community doesn't like it." Time, Dec. 20, 1982, at 74. The Milwaukee and Madison Jewish Councils have stated "[w]e believe that religion in the American tradition and system is a private matter . . . the displaying of religious symbols is inappropriate on government property." UPI BC cycle, Dec. 3, 1984. Richard Wolfsohn, with the Southeast Region of the American Jewish Congress, has claimed that "[o]ur organization, along with many other midstream Jewish organizations, is opposed to the display of any religious symbol on publicly-owned property including the menorah." PR Newswire, Dec. 15, 1987.

beacon of hope to small religious groups both in this country and all over the world. For centuries, this hope has attracted pilgrims from every land and every creed, seeking a place they could call home. This court should encourage that hope.

By upholding the rights of religious groups to be heard in public fora, we would grant full protection to the ability of all groups to participate in public debate. Unfortunately, the court has chosen instead to deter and diminish many forms of religious speech. It has demonstrated hostility toward religion, rather than the neutrality the Constitution requires. Consequently, it has issued a ruling that is wrong in this case and will cause more confusing rulings in the future. I respectfully dissent.

APPENDIX II

# In the
# United States Court of Appeals
## For the Seventh Circuit

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No. 89-3756

JANE DOE,

*Plaintiff-Appellee,*

*v.*

GEORGE D. SMALL, Mayor of the City of Ottawa, Illinois, BARBARA J. LINDQUIST, WILLIAM C. FERGUSON, ALAN R. HOWARTER, WILLIAM N. STEVENSON, Members of the City Council of the City of Ottawa, Illinois and CITY OF OTTAWA, ILLINOIS, a municipal corporation,

*Defendants,*

and

OTTAWA FREEDOM ASSOCIATION, LIMITED,

*Intervening Defendant-Appellant.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 6952—**Milton I. Shadur**, *Judge*.

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ARGUED SEPTEMBER 7, 1990
REARGUED DECEMBER 19, 1991
DECIDED MAY 15, 1992

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Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR.,* CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges.*

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* Judge Wood, Jr. assumed senior status on January 16, 1992, after the hearing of this case on December 19, 1991.

COFFEY, *Circuit Judge.* The Ottawa Freedom Association ("OFA")[1] appeals the district court's entry of summary judgment enjoining the City of Ottawa from allowing any person or group from displaying the paintings at issue in Washington Park in Ottawa, Illinois. Because this injunction is overbroad and infringes on the free speech rights of any private person desiring to display the paintings, we reverse.

## I. FACTS[2]

### A. The Paintings

In 1956 the Ottawa Retail Merchants' Association, a private organization, commissioned the painting of sixteen canvases depicting scenes from the life of Christ in an effort to "put Christ back in Christmas." These paintings were displayed in Washington Park, located in the heart of the City of Ottawa, Illinois, during the Christmas season from 1957 to 1969 and again in 1980 through 1988. Except for the years 1964 through 1967, when the City arranged for the erection of the paintings, the display has been exhibited by private parties.

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[1] This suit was initially filed against the Mayor, members of the City Council and the City of Ottawa, Illinois by one Richard Rohrer. Jane Doe was substituted for Rohrer after he lost standing by moving away from Ottawa, and the Ottawa Jaycees intervened as defendants, since their practice of displaying the paintings made them the real party in interest. The Ottawa Jaycees pursued the original appeal of the district court's judgment, but after the panel's May 28, 1991 affirmance of the district court, the Jaycees transferred the paintings to the OFA, and at this time the OFA was substituted as intervenor-defendant-appellant.

[2] Where the record is capable of supporting differing interpretations of the facts, we shall view them in the light most favorable to the appellants: "In reviewing a grant of summary judgment, we must view the record and all inferences drawn therefrom in the light most favorable to the party opposing the motion. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L.Ed.2d 176 (1962)." *Beard v. Whitley County, REMC*, 840 F.2d 405, 409 (7th Cir. 1988).

The paintings were not displayed during the 1970s but were stored under an old grandstand structure and apparently forgotten. According to a 1980 Ottawa newspaper article, the City Parks Superintendent who discovered the paintings under the old grandstand stated:

> " 'We've got to find a home for them, got to find an owner,' he said. 'This building will be torn down early next spring, and the city doesn't have another place big enough to store them.' "

Upon reading about the discovery of the paintings, the local chapter of the Junior Chamber of Commerce (Jaycees), a national service-oriented organization, contacted the City and volunteered to take charge of the paintings; the Jaycees were the caretakers of the paintings until they transferred their custody to the OFA shortly before the request for rehearing *en banc*.

When the paintings were displayed, they occupied less than one-half of the west side of Washington Park in a slightly V-shaped angle (150°), and the vertex of the display was forty-eight feet from the street. Including the area between the paintings and the sidewalk, the paintings occupied 6.34 percent of the Park. A 20 1/2" wide by 21" high sign with letters 1 1/16" high, clearly legible from the sidewalk but not from across the street, accompanied the paintings and stated: "THIS DISPLAY HAS BEEN ERECTED AND MAINTAINED SOLELY BY THE OTTAWA JAYCEES, A PRIVATE ORGANIZATION, WITHOUT THE USE OF PUBLIC FUNDS."[3]

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[3] Over the years since 1980 when the Jaycees began displaying the paintings, they occupied a space on the west side of Washington Park on an average of two months per year. In 1988, the last year the paintings were displayed, they were up for thirty-five days. The longest period of time that the paintings were exhibited was in 1986, when they were on display for three and one-half months. The Jaycees' explanation for the extended period of time that particular year was that the metal poles supporting the paintings were frozen into the metal sleeves in the ground, thus

(Footnote continued on following page)

## B. The Forum

Washington Park is a quintessential public forum well removed from the seat of the City government; City Hall is some three blocks away, and no City buildings border the park. Deposition testimony from a number of Ottawa residents established that Washington Park has historically been an open public forum with free and equal access to all for lawful purposes. Space in the Park is allocated on a first-come, first-served basis, without specific permission from the City:

> "Q. So if I wanted to display my pictures depicting worship of the devil tomorrow in Washington Park, I could just go in and put up those displays, is that correct?
>
> * * *
>
> "The Witness: You can put them up, we might have to have, maybe, the engineer or someone that knows where the wiring is at so you don't get electrocuted, but yes.
>
> * * *
>
> "Q. And other than checking the wiring in the ground, are there any other limits on installing concrete holes in the park?
>
> "A. No.

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[3] *continued*

making it impossible to remove the paintings until the ground thawed. The Jaycees ensured that the problem would not reoccur by replacing the original dilapidated supports with new concrete foundations with metal sleeves for the paintings (at the Jaycees' expense) the following year. The Jaycees designed the new supports and installed them in locations approved by the City Engineer and City Commissioner of Public Improvement. According to the mayor's deposition testimony, such approval for digging in the Park is necessary to avoid interfering with utility services such as gas, electric, telephone or water.

"Q. So I could place these holes anywhere in the park without seeking City of Ottawa's permission, so long as I complied with the wiring in the ground, is that correct?

"A. Yes.

"Q. And the City Engineer would advise me as to whether or not I was complying with any requirements or concerns with respect to wiring in the ground?

"A. Yes.

* * *

"Q. And I could, in fact, use the Jaycee holes to display paintings depicting devil worship without seeking the permission of the City of Ottawa, is that correct?

"A. That's correct.

* * *

"Q. I could do so without seeking the permission of the Ottawa Jaycees?

"A. Yes.

"Q. So long as I got there first?

"A. Yes."

Deposition of City Council Member William C. Ferguson at 44, 86-88.

Unrestricted public access to Washington Park dates back some 133 years to 1858 when Abraham Lincoln and Steven Douglas used the Park for one of their famous debates. In 1988, President Bush likewise chose Washington Park as a forum for a speech and rally during his presidential campaign. According to City records, the Park has been the site of a broad array of private activities in recent years, including religious activities:

*1982*

| | |
|---|---|
| June 19, 1982 | Residents Against Polluted Environment sponsored "Earth Day" |
| Aug. 2, 1984 | Tora! Tora! held a concert for world peace |

*1983*

| | |
|---|---|
| Oct. 29, 1983 | *Open air meeting sponsored by the Congregation of the New Life Ministry, Inc.* |

*1984*

| | |
|---|---|
| June 28, 1984 | *Special Church Service* |
| July, 1984 | *Religious Concert* |
| Aug., 1984 | Concert for World Peace |
| Aug., 1984 | Cut a Thon by Cosmetologists |

*1985*

| | |
|---|---|
| Jan., 1985 | *Illinois Valley Citizens for Life Prayer Vigil* |
| May, 1985 | Concert in Washington Park |
| June, 1985 | *United Methodist Church Services* |
| July, 1985 | University Women Book Sale |
| July, 1985 | Grade School Band Social and Concert |
| Oct., 1985 | United Way Lunch |

*1986*

| | |
|---|---|
| June, 1986 | Camp Fire Girls Ceremony |
| June, 1986 | Art League Display |
| June, 1986 | *Pastor Reed Church Service* |
| July, 1986 | Arts & Crafts Show—Art League |
| July, 1986 | A.A.U.W. Book Sale |
| July, 1986 | Decatur Park Concert |
| Aug., 1986 | Grade School Band Concert |
| Aug., 1986 | Flea Market |
| Aug., 1986 | A.A.U. Book Sale |
| Sept., 1986 | Ottawa Lioness Club Flea Market |
| Sept., 1986 | Nam Vets POW/MIA National Recognition Ceremony |

*1987*

| | |
|---|---|
| May, 1987 | Ottawa Retail Council Flea Market |
| May, 1987 | *Amazing Grace Fellowship Meeting and Concert* |
| July, 1987 | *New Lite Ministries Rummage Sale* |
| July, 1987 | Nam Vets—Concert |
| Aug., 1987 | Sesquicentennial Celebration Activities |
| Sept., 1987 | Lioness Club Flea Market |
| Sept., 1987 | Nam Vets POW/MIA National Recognition Ceremony |
| Oct., 1987 | *All Church Concert* |

*1988*

| | |
|---|---|
| May, 1988 | Mayfest Flea Market |
| July, 1988 | Art Show |
| July, 1988 | Book Sale |
| July, 1988 | Dance Show |
| Aug., 1988 | Flea Market |
| Sept., 1988 | Lioness Flea Market |
| Sept., 1988 | POW/MIA National Recognition Ceremony |

(Emphasis added.)

For many years the City of Ottawa, in the spirit of the season and "goodwill toward others," has combined with private parties in a joint effort to decorate the downtown area with festive holiday and Christmas decorations during the Yuletide season. As part of the City's decorations, it displayed a Santa Claus house in the Park each year during the 1960s and 1970s, but more recently the City displays the house in alternate years. Additionally, the lamp posts in the downtown area as well as those in and surrounding Washington Park are garnished with Christmas decorations. In 1988 the City added the "Festival of Lights" to the Christmas display in Washington Park. The "Festival of Lights" decorations included lights, candles, bows, artificial snowflakes and a fifteen-foot snowman. The lights were placed on the memorials in the Park as well as on tree branches, including those trees surrounding the

paintings at issue in this appeal. The giant candles, bows, snowflakes and the fifteen-foot snowman all served as different focal points and were visible from in and around the Park. The Christmas display in the Park also included an evergreen Christmas tree displayed by the Salvation Army that provided its own focal point.

### C. The Dispute

In November of 1986, Richard Rohrer wrote a letter to the City Council requesting that the paintings be removed from Washington Park because they "represent an unacceptable endorsement of Christianity by the city and violate the constitutional rights of all Ottawans who are not Christians." On December 2, 1986, the Ottawa City Council passed the following resolution:

> "WHEREAS, for many years, the City of Ottawa has celebrated the Christmas season with many public displays of seasonal decorations throughout the community, and
>
> "WHEREAS, the downtown area of the City has, for more than 20 years, been decorated through a coordinated effort of private and public bodies, including the County of LaSalle, City of Ottawa, Ottawa Area Chamber of Commerce, Retail Merchants Association, Ottawa Jaycees and various church and other private groups owning property in or near the downtown area, and
>
> "WHEREAS, the decorations have consisted of ornamental lighting on the streets in downtown Ottawa; ornamental lighting, Christmas trees, lighted and festooned trees throughout the downtown area; Santa Claus house on the Courthouse lawn; ornamental lighting, and eighteen large paintings celebrating the Christmas spirit in Washington Park; nativity scenes and other seasonal decorations on private property surrounding Washington Park; ornamental lighting on the Fire and Police station and other decorations in keeping with the season, and

"WHEREAS, because of a single complaint filed with it concerning the paintings in Washington Park the City has reviewed the history of the paintings and find that they were initially commissioned by the Retail Merchants Association over 20 years ago as a portrayal of 'The Greatest Story Ever Told' in conjunction with and in commemoration of the spirit of Christmas; that the Retail Merchants Association for many years erected the pictures in Washington Park as part of the Christmas decorations for downtown Ottawa in keeping with the spirit of the season; that in recent years the pictures had been maintained, erected, dismantled and stored by the Ottawa Jaycees as their part in providing appropriate decorations for the community as part of the Christmas season, and

"WHEREAS, the City Council of the City of Ottawa finds that the decorations in downtown Ottawa which have been erected for more than the last 20 years by public and private agencies truly represent a cooperative effort by the community to provide appropriate seasonal yuletide spirit so that the people attracted by the Christmas decorations to shop and otherwise do their business in the downtown area will be benefitted by the traditional, beautiful and seasonally appropriate decorations which they have come to know and love for 2 decades. The City Council specifically finds the pictures erected by the Jaycees in Washington Park are an integral part of the seasonal decorations epitomizing Christmas in the hearts and minds of the citizens of the City.

"NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Ottawa, that after due consideration and reflection upon the complaint raised concerning the pictures in Washington Park, that this council endorse the activities of the Ottawa Jaycees in maintaining, erecting, dismantling and storing said pictures and incorporating them in the overall Christmas display that annually graces the downtown area of the City and further thanks all the other groups,

> public and private, who also maintain, erect, dismantle and store other portions of the Christmas decorations which are integral to the annual yuletide season and the spirit thereof."

On August 11, 1988, Rohrer filed a complaint with the federal district court seeking to enjoin the display of the paintings; he modified his complaint January 11, 1989, to request that the court enjoin the exhibit unless the City placed restrictions on the frequency and duration of the display; and the complaint was once more amended on June 12, 1989, to substitute Jane Doe as plaintiff after Rohrer moved from Ottawa.

Subsequent to the filing of the suit, Mayor Small stated that the City was "going to proceed and put the pictures back in the park." *Suit Filed Over Park Paintings*, Ottawa Daily Times, Aug. 16, 1988. In regard to Rohrer's filing of the suit, the Mayor said:

> "This is what I guess happens in a free country. If he doesn't like the paintings, then he can drive around them. . . . Maybe he's looking for a public reaction, but I don't want him crying when the public puts the heat on him."

*Id.* Several months later the City, on the recommendation of the mayor and the advice of the city attorney, changed its position in regard to the display of the paintings. At the October 18, 1988 City Council meeting, the Council voted to prohibit the display of the paintings and, as an alternative, to initiate a "Festival of Lights" as Christmas decorations for Washington Park. Shortly thereafter, the First National Bank of Ottawa offered to allow the Jaycees to display the paintings on its property located across the street from Ottawa City Hall. Upon hearing of the proposed new location for the paintings, Mayor Small stated: "It's an honor to have the pictures across the street from City Hall. . . . Maybe someday they'll be back in Washington Park where they belong." *Paintings Get Home*, Ottawa Daily Times, Oct. 21, 1988. A representative of the National Legal Foundation appeared

at a special meeting of the City Council on October 28, 1988, and offered to defend the lawsuit if the City gave the Jaycees permission to proceed with displaying the paintings in Washington Park.[4] At this time, the City Council voted to rescind their decision preventing the Jaycees from displaying the paintings during the 1988-1989 Christmas season. Subsequently, the Ottawa Jaycees, represented by the National Legal Foundation, intervened as defendants and took over the defense of the lawsuit.

The Jaycees moved for summary judgment on the ground that the paintings constitute private religious speech, protected under the Free Speech Clause of the First Amendment. Doe likewise filed a motion for summary judgment, arguing that the display of the paintings in a public park violated the Establishment Clause of the First Amendment because the display constituted a state establishment of religion. The district court entered summary judgment for Doe, holding that the display of the paintings in Washington Park violated the Establishment Clause. *See Doe v. Small*, 726 F. Supp. 713 (N.D. Ill. 1989). The judge obviously viewed the City of Ottawa as a participant in the Jaycees' speech, for he stated:

> "[It] makes no difference to the analysis or result that Washington Park may be a public forum. . . .
>
> . . . .
>
> ". . . City Defendants may—and must—regulate religious speech in Washington Park, including that of Jaycees, if such speech presents the danger of a violation of the Establishment Clause."

*Id.* at 724. The district court found that the display of the paintings violated the Establishment Clause and permanently enjoined their display in Washington Park:

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[4] The lawsuit is being prosecuted by the American Civil Liberties Union, so it does not appear that the plaintiff or the City of Ottawa has expended their own funds in this lawsuit.

> "This Court has been advised that the paintings have already been put up on display for the current season. City is therefore ordered to have the paintings removed by December 8, 1989 and *to forego any future display of the paintings in the Park by any group.*"

*Id.* at 725 (footnotes omitted) (emphasis added).

## II. ISSUES

The issues we address on this appeal are: 1) Whether private persons may be enjoined from engaging in religious speech in a public forum on the basis of the religious content of the speech; and 2) Whether the proper remedy was to enjoin the Jaycees' speech if the display was not purely private and therefore violated the Establishment Clause. The court is not in agreement as to whether the City violated the Establishment Clause in its conduct. Some members of the court feel that the City Council's resolution "endors[ing] the activities of the Ottawa Jaycees" in placing the paintings in the Christmas display was merely a "thank you" to the Jaycees while other members of the court believe the resolution independently or in addition to other conduct of the City to be an endorsement of the content of the paintings. We need not and will not address the issue of whether the City of Ottawa endorsed the Jaycees' religious speech because the City has not appealed.[5]

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[5] Justice O'Connor's "endorsement" test, initially articulated in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S. Ct. 1355, 1366 (1984), prohibits the government from endorsing or favoring any particular religious expression or belief. This question concerning the Establishment Clause and whether the "endorsement" test Justice O'Connor expressed is proper is currently before the Supreme Court in *Lee v. Weisman*, No. 90-1014. Although we discuss the City's alleged "endorsement" of the paintings throughout this opinion, we take no position on whether that is the correct test because the issue is not before us.

## III. PRIVATE RELIGIOUS SPEECH IN A PUBLIC FORUM

The district court determined that the Jaycees' display of the paintings violated the Establishment Clause and ordered the City "to forego *any* future display of the paintings in the Park *by any group.*" *Doe v. Small*, 726 F. Supp. at 725 (emphasis added). The district court's order was overbroad because it restrains the speech of parties who were not before it, such as the OFA or any other group that might desire to display the paintings in Washington Park in the future. In deciding to permanently enjoin the display of the paintings in Washington Park, regardless of who wished to display them, the district judge stated that "*it makes no difference to the analysis or result that Washington Park may be a public forum.*" *Id.* at 724 (emphasis added). We disagree. It is well established that private religious speech is protected under the Free Speech Clause of the First Amendment. "[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment. *See, e.g., Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *Niemotko v. Maryland*, 340 U.S. 268, 71 S. Ct. 325, 95 L.Ed. 267 (1951); *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148, 92 L.Ed. 1574 (1948)." *Widmar v. Vincent*, 454 U.S. 263, 269, 102 S. Ct. 269, 274 (1981) (footnote omitted). As Justice O'Connor writing for the Court has noted, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. of Westside Community Schools v. Mergens*, 110 S. Ct. 2356, 2372 (1990) (emphasis original). In enjoining "any future display of the paintings in the Park by any group," *Doe v. Small*, 726 F. Supp. at 725, the district judge ignored this "crucial difference."

*Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 103 S. Ct. 948 (1983) is an ap-

propriate starting point for an analysis of whether private speech may be excluded from a quintessential public forum:

> "In places which by long tradition or by government fiat have been *devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.* At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' *Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 963, 83 L.Ed 1423 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion *it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Carey v. Brown*, 447 U.S. 455, 461, 100 S. Ct. 2286, 2290, 65 L.Ed.2d 263 (1980)."

*Id.*, 460 U.S. at 45, 103 S. Ct. at 954-55 (emphasis added). The district court found the government's obligation to avoid violating the Establishment Clause to be a sufficiently compelling interest to justify a content-based exclusion of religious speech in Washington Park. Thus, the court held that the "City Defendants may—and must—regulate religious speech in Washington Park, including that of Jaycees, if such speech presents the danger of a violation of the Establishment Clause." *Doe v. Small*, 726 F. Supp. at 724. While the government's interest "in complying with its Constitutional obligations *may* be characterized as compelling," *Widmar*, 454 U.S. at 271, 102 S. Ct. at 275 (emphasis added), the Supreme Court has refused to find the Establishment Clause to be a sufficiently compelling interest to exclude private religious speech even from a limited public forum created by the government. In *Widmar*, rather than finding the Establishment Clause to provide a sufficiently compelling interest to justify a content-based exclusion of a campus organization's religious speech from the facilities of the University of Mis-

souri at Kansas City, the Supreme Court held that the First Amendment prohibited the university from denying the religious organization equal access to the facilities that were open to non-religious groups. The Court rejected the state's argument that Missouri's interest in the separation of church and state could justify a content-based exclusion of religious speech:

> "[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech."

*Id.* at 276, 102 S. Ct. at 277-78.[6] As in *Widmar*, the religious speech of private parties who wish to display the paintings of Christ in Washington Park are protected under the Free Exercise Clause and the Free Speech Clause. Since the State of Missouri's desire to achieve greater separation of church and state than provided for under the Establishment Clause was an insufficient interest to justify a content-based exclusion of religious speech in the limited public forum of a state university, we fail to comprehend how the Establishment Clause could constitute a sufficiently compelling state interest to justify a content-based exclusion of private religious speech in a quintessential public forum. Thus, we hold that the district judge erred in finding that the Establishment Clause provided

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[6] The Court reaffirmed its holding that allowing religious organizations to have access even in a limited public forum does not violate the Establishment Clause in *Mergens*, 110 S. Ct. at 2370-72. In *Mergens*, the Supreme Court rejected the argument that the equal access act, 98 Stat. 1302, 20 U.S.C. §§ 4071-4074, which requires high schools to provide equal access to religious student groups along with other student groups for the use of school facilities, violated the Establishment Clause.

a sufficiently compelling interest to justify a content-based exclusion of speech from Washington Park. *The City of Ottawa may not exclude private persons from Washington Park merely because of the religious content of their speech.*

The district court obviously assumed that the religious content of the paintings would result in some kind of a violation of the Establishment Clause regardless of what private group displayed them in Washington Park, so it ordered the City "to forego any future display of the paintings in the Park by any group." *Doe v. Small*, 726 F. Supp. at 725. In a footnote, the district judge said, "[t]his Court finds that the unmistakably religious content of the paintings as a group moots any time-and-manner restrictions as a saving device." *Id.* at n.23. The court erred in finding that the religious content of a display in a quintessential public forum far removed from the seat of government violates the Establishment Clause, for public forums must be open to religious speech.

> "[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. 'The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.' "

*Mergens*, 110 S. Ct. at 2371 (citation omitted). Doe argues that Ottawa has no equal access policy for Washington Park, and thus the OFA (or any other private party including the Jaycees) is not entitled to display the paintings there. But Doe bears the burden of persuasion on the issue of no equal access, and from our review of the record, it is devoid of any evidence of the City refusing to allow equal access to any and all in Washington Park within the confines of the law. In fact, we have identified and listed some thirty-plus private groups who have made use of the Park for organized events in recent years. *See*

*supra* at 6-7. We are of the belief that if the plaintiff had discovered evidence of the City denying access to Washington Park for the purpose of a speech-related activity to anyone, she most certainly would have brought that evidence to the court's attention. In the absence of any allegation (much less actual proof) that Ottawa has denied any person access to the Park, it is immaterial that Ottawa does not have an officially stated policy of equal access, for the Constitution mandates that religious speakers may not be discriminated against in a public forum on the basis of their speech. The City of Ottawa is required to comply with the constitutional mandate regardless of whether it has an officially stated policy of doing so, and Doe has failed to demonstrate non-compliance. Moreover, the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government. *See Mergens*, 110 S. Ct. at 2372. We hold that the district court erred in ordering the City "to forego any future display of the paintings in the Park by any group." *Doe v. Small*, 726 F. Supp. at 725.

Our holding that the paintings may not be excluded from Washington Park is consistent with the Supreme Court cases cited above as well as with precedent from this court. In *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3726 (U.S. Apr. 23, 1991) (No. 90-1573), we reviewed an injunction prohibiting an authentic Italian mass from being said at an Italian festival. While the panel majority and the dissenting judge were in disagreement as to whether the Village of Crestwood was the sponsor of the mass, the panel was in full agreement as to the right of private parties to engage in religious expression in a public forum:

> "The Park is a public forum. If the Festival, too, is open to private groups that wish to participate, and if the Crestwood Women's Club (or a church) were the sponsor of the mass, it would be difficult to find

> an obstacle in the Establishment Clause of the First Amendment. . . . *A government may not close its public forums to religious practice by private parties. Widmar v. Vincent*, 454 U.S. 263 (1981); *Fowler v. Rhode Island*, 345 U.S. 67 (1953). Although the holding of the mass in a public park creates a possibility that some members of the public will assume sponsorship (as opposed to acquiescence) by the polity, *the government's obligation not to discriminate against religious speech in circumstances in which secular speech would be allowed prevails.*"

*Id.* at 1478 (citations omitted) (emphasis added). We likewise emphasized the importance of equal access for religious speech in *Lubavitch Chabad House, Inc. v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990). We rejected Lubavitch's argument that the City of Chicago's content-neutral regulations prohibiting all free-standing structures in public areas at O'Hare International Airport were overbroad (the opinion distinguished leased spaces from public areas). But we were careful to point out that Lubavitch's free-standing Menorahs could not be excluded if other free-standing structures were permitted:

> "*First Amendment jurisprudence certainly does mandate that if the government opens a public forum to allow some groups to erect communicative structures, it cannot deny equal access to others because of religious considerations, Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), but the record is clear that the City has prohibited all groups from erecting structures in the airport public areas."

*Id.* at 347 (emphasis added). We are unpersuaded that whatever relationship the City of Ottawa may have had with the paintings in the past requires us to deviate from the equal access principles enunciated in *Widmar*, *Mergens*, *Crestwood* and *Lubavitch*.

## IV. NARROWLY TAILORED REMEDY

In permanently enjoining the display of the paintings "by any group," the district court failed to consider whether the total ban was narrowly tailored to remedy the "evil" of the City's alleged endorsement of the message of the paintings.

> "A statute [or remedy] is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810, 104 S. Ct. 2118, 2130-2132, 80 L. Ed. 2d 772 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an aesthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because 'the substantive evil—visual blight—[was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself.' *Id.*, at 810, 104 S. Ct., at 2131."

*Frisby v. Schultz*, 487 U.S. 474, 485-86, 108 S. Ct. 2495, 2503 (1988). As we demonstrated above, the government (including federal courts) may not view private religious speech in a public forum removed from the seat of government to be evil because of its status as religious speech. *Cf. Mergens*, 110 S. Ct. at 2371. Thus, the only redressable "evil" that can arise from the display of religious symbols in a quintessential public forum is a perception that the government, through conduct other than merely tolerating the presence of the religious speech, has endorsed the speech or made the display of the symbols its own in a manner that violates the Establishment Clause. Because the First Amendment mandates that the government permit religious speech in quintessential public forums, the mere presence of religious symbols in such a forum cannot violate the Constitution. Yet, the district

court's remedy was directed only at prohibiting the City from allowing the display of the paintings in Washington Park rather than at the conduct of the City that the district court evidently found to be demonstrative of an endorsement of the display. *The district court's order was not narrowly tailored because it sought to eliminate the display of the paintings "by any party" instead of limiting it to the "evil" of the City's alleged endorsement of the paintings alone.*

The district judge's permanent injunction prohibiting the display of the paintings implies that once the government impermissibly endorses religious speech (e.g. the paintings), that particular speech becomes poisoned and no private party may thereafter express that view.[7] The court evidently believed that the alleged endorsement of the City could not be remedied without a complete ban on the display, but that is an incorrect assumption. This court has previously recognized that the government can take steps to remove indicia of endorsement of private religious speech. *See Mather v. Village of Mundelein*, 864 F.2d 1291, 1292 (7th Cir. 1989) (Village's addition of secular symbols to its own existing display of a crèche on public property sufficient to avoid appearance of impropriety). Other courts have likewise recognized the ability of government to disassociate itself from private expression that might otherwise have been attributed to it. *See American Civil Liberties Union v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990) (conditions ordered by district court adequate to avoid impression of state endorsement of religious message inherent in a crèche); *McCreary v. Stone*, 739 F.2d

[7] At the *en banc* oral argument, the ACLU attorney admitted that the Constitution prohibits viewing governmental endorsement of private speech as permanently poisoning it, but denied that the district court's injunction implied otherwise. We are unable to understand how the district court could permanently enjoin the display of the paintings "by any group" unless the court found the paintings to be eternally poisoned by the government's alleged endorsement.

716 (2d Cir. 1984), *aff'd* by an equally divided Court *sub nom. Board of Trustees v. McCreary*, 471 U.S. 83 (1985) (remand for determination of size of sign necessary to dissociate the City from a free-standing crèche in a public park). If the district court found the conduct of the City violative of the Establishment Clause, it should have ordered a remedy that would have directly addressed the violation. For example, if the City Council's resolution endorsing the "activities" of the Jaycees constituted an endorsement of the paintings, the court should have ordered a rescission of the resolution;[8] if the mayor's comments expressing approval of the paintings were inappropriate, the court could have enjoined further such statements or even required a retraction; if the court felt that the very presence of the paintings in the park provided evidence of an endorsement, it could have ordered the City to post a more visible sign of its own specifically disclaiming any association with the paintings. The district court could have fashioned any number of remedies that would have removed the City's alleged endorsement without infringing on the rights of private parties to engage in religious expression in Washington Park; instead, it placed an impermissible burden on free speech, which must be removed.

This court is agreed that the City should not engage in any conduct that approves or disapproves of the religious beliefs of anyone. *The City must treat all who wish to engage in expressive activities within the confines of the law in Washington Park (and other public forums) equally.*[9] In view of the controversy engendered by the

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[8] Several members of the court, including the author of this opinion, believe the resolution too old to currently constitute an endorsement regardless of its wording.

[9] To the extent the concrete foundations for the paintings might be viewed as an impermissible governmental endorsement of the paintings, we note that the record is void of evidence suggesting that the City would have denied permission to any other group

(Footnote continued on following page)

display of these paintings, we think the Ottawa City Council would be well-advised to carefully avoid any type of conduct that could be interpreted as an endorsement of the religious message of the paintings.[10] If the mayor or any City Council member or official of the City wishes to express an opinion of a private party's exhibit, the person should clarify whether he or she is speaking in an individual or official capacity.

Permitting the OFA or the Jaycees to display the paintings in Washington Park complies with the concerns of the Establishment Clause as well as the Free Speech Clause. In the physical context of an exhibit on governmental property in the seat of government where "any [private] display located there fairly may be understood to express views that receive the support and endorsement of the government," *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3104 n.50 (1989), the Establishment Clause may require the removal of such religious display if there is no other narrowly-tailored manner of avoiding the appearance of governmental endorsement of the message. But in a quintessential public forum removed from the seat of government, entering an injunction directed only at prohibiting the governmental conduct that provides indicia of endorsement is a narrowly-tailored manner of satisfying the concerns of the Establishment Clause, while

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[9] *continued*

or person to use the supports or install their own. If there were such evidence, the proper remedy would be to order the City to either allow the installation of the additional supports or remove the existing supports in order to provide for equal treatment of all protected speech. As noted above (see n.3), the City's minor participation in determining the location of the Jaycees' supports was necessary to avoid risking interference with underground utility lines.

[10] That is not to say that it would be impermissible for the City to include religious symbols of its own in a Christmas display. *See Mather*, 864 F.2d at 1293.

allowing the private speaker to continue to express religious views avoids infringing on the liberties guaranteed under the Free Speech Clause. Hence, there is no conflict between the Establishment Clause and the Free Speech Clause when private persons engage in religious speech in a public forum.[11]

## V. CONCLUSION

We hold that the district court erred in issuing an overbroad injunction mandating that the City must remove the paintings from the park and "forego any future display of the paintings in the Park by any group" because the overbroad injunction was a content-based exclusion of speech without a compelling state interest to support it. We further hold that the court erred in enjoining the display of the paintings as opposed to enjoining only the conduct of the City that allegedly violated the Establishment Clause. The judgment of the district court is REVERSED except for the holding that the City of Ottawa violated the Establishment Clause. Since the City of Ottawa has not joined in appealing that holding, we express no opinion as to whether the City violated the Establishment Clause. Should the plaintiff wish to pursue her original intent of enforcing the regulation of private speech in Washington Park, it will be necessary for her to apply to the district court for a *limited* injunction consistent with the language in this majority opinion. The injunction against the City is VACATED and the case is remanded to the district court pursuant to Circuit Rule 36.

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[11] If the City wishes to regulate speech in Washington Park, a content-neutral regulation would permit the paintings to be exhibited the same length of time as the rest of the Christmas displays, but not a time period of greater or lesser duration.

CUDAHY, *Circuit Judge*, concurring in the judgment.

In his amended complaint of January 11, 1989, Richard J. Rohrer, the original plaintiff in this case, sought a permanent injunction prohibiting the defendants from allowing the display of the paintings *so long as they did not impose limits on the frequency or duration of the display.* The distinguished district judge went far beyond the relief requested and ordered the City of Ottawa to have the paintings removed and to forego any future display of the paintings. He opined that "the unmistakably religious content of the paintings as a group moots any time-and-manner restriction as a saving device." Memorandum Opinion and Order at 28 n.23 (Dec. 4, 1989) (Mem. Op.). I agree without reservation with the majority in vacating this draconian grant of relief and in partially reversing the grant of summary judgment that underlies it.

The action of the district court was apparently rooted in the belief that the Ottawa Jaycees, a private organization, was an alter ego or agent of the City and indistinguishable from it for purposes of the Establishment Clause. See Mem. Op. at 10 n.14 (statements of the Jaycees and the City may be attributed to each other because the Jaycees are participants in state action). I suppose that under some circumstances such a symbiotic relationship could be found to exist and a private organization subsumed under a public body for Establishment Clause purposes. But there was no such finding here and the paramount importance of the Free Exercise and Free Speech Clauses is such that only the most clear and convincing evidence could justify such a finding (which would in effect deprive the private organization of its First Amendment liberties). It seems to me unlikely that such a finding could emerge from a summary judgment.

To the extent that the district court did not rely on an assumption that the Jaycees were speaking for the City, it assumed that these paintings, posted prominently in a public park, are like a crèche in the middle of a county courthouse. Mem. Op. at 22-25 & 26 (comparing the dis-

play to the crèche banned in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)). The court opined that "it makes no difference to the analysis or result that Washington Park may be a public forum." Mem. Op. at 25. But this is precisely the distinction that does matter. For even in *Allegheny*, the county was only forbidden to allow the crèche to remain *in that particular spot*. *Id.* at 597 (opinion of Blackmun, J.) & 598 (opinion of the Court). The remedy for an Establishment Clause violation, however we choose to define it, must be bounded by the rights of the parties involved. In *Allegheny*, the county could exclude any speaker from the Grand Staircase and could appropriately be ordered to do so. *Id.* at 600 n.50 (Grand Staircase of court building is not a public forum). Here, the City is constitutionally required to maintain open access to Washington Park, a quintessential public forum, and therefore should not be ordered to deny such access to anyone.

There has, of course, been a relationship between the City of Ottawa and the display of the paintings for many years. For several years in the Sixties, the City itself displayed the paintings. Later the mayor apparently sought a suitable custodian for the paintings, and various mayors said nice things about the paintings or their display and might, under some theories, be said to have "endorsed" the display. The analysis of those various mayoral comments seems to raise, *inter alia*, the difficult question whether a high public official's mere commendation of a religious activity or event—the sort of commendation which I would guess is routine and frequent in the daily practice of municipal government and politics—violates the Establishment Clause.

In addition, there was the resolution of the City Council "endorsing" the Jaycees' activities. This might be seen as a clear violation of the Establishment Clause, but it too must be scrutinized for purposes of determining the *present* perception of the paintings. The majority opinion raises and disposes of the argument that past acts of endorsement by the City may "poison" the paintings and

their display. There can be a "taint" to the extent that past acts may affect *present* perceptions. But we must bear in mind that it is *present* perceptions which are relevant to the question of a *present* violation of the Establishment Clause and the need for *present* injunctive relief.

As the majority has provided, this case must be remanded to the district court for further proceedings. Such a remand is clearly required because the City of Ottawa has been found to have violated the Establishment Clause and that determination of liability has not been appealed. The plaintiff is entitled to appropriate relief against the City even though the injunction running in effect against the Jaycees and the Ottawa Freedom Association (OFA) must be dissolved.

The majority has also made several constructive suggestions for more appropriate relief: rescission of the council resolution, retraction of the mayor's statements, a larger sign posted by the City, a guarantee of equal access to the concrete foundations and a content-neutral time limit on the display. *Supra* at 21-23. But the majority has also decided to forego any detailed or binding discussion of these issues. I think that the district court and the parties deserve more assistance from us.

The majority's reluctance is partly due to its determination that, as an intervenor, OFA has no standing to appeal from the finding that Ottawa violated the Establishment Clause. But even if OFA may appeal "only to the extent of the interest that made it possible for [it] to intervene," 7C Charles A. Wright, et al., Federal Practice and Procedure § 1923 at 517 (2d ed. 1986) (citing cases), *some* forms of relief will surely affect its interest in displaying the pictures. As I have noted, the plaintiff has asked only for time and manner restrictions on the display of the paintings. The district court allowed the Jaycees to intervene as of right precisely because this kind of relief would affect their interests. Memorandum Opinion and Order at 3 (Dec. 14, 1988). Even if we may not address those forms of relief that run only against the town—rescission of the

resolution, posting a sign and the like—the restrictions for which the plaintiff asked are still before us.

The other reason the majority has declined to discuss appropriate remedies is that several members of this court believe that Ottawa did not, in fact, violate the Establishment Clause. They would prefer to avoid a discussion that will lend weight to a constitutional theory with which they disagree and significance to facts they find innocuous. I do not think, however, that we are at liberty to anticipate the Supreme Court's forthcoming decision in *Lee v. Weisman*, No. 90-1014, when the Court's decision will have no impact on future proceedings in the district court: no matter what the Court decides, Ottawa's violation of the Establishment Clause will still be res judicata, and Doe will still be entitled to relief. I apply the law that is—Justice O'Connor's endorsement test as expressed in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) and adopted in *Allegheny*, 492 U.S. at 592-94 (opinion of the Court)—and evaluate the appropriateness of relief in those terms.

Settling on a constitutional doctrine does not solve every problem, however. Since OFA has no standing to challenge the existence of an Establishment Clause violation, I have no basis to identify which, if any, of the undisputed facts in this case constitute an Establishment Clause violation. But clearly one of the problems is that a large display erected on public property for long periods every year may easily appear to be endorsed by the local government, no matter what the government's intent. The City's permission to mount such a display may readily have the *effect* of endorsing a particular religious message and thus "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

It is strange that a government can violate the Establishment Clause by tolerating free speech. And there is a danger that an effects test may enable the sort of heckler's

veto of which Judge Easterbrook writes so eloquently. *Infra* at 39. But imagine that the City of Ottawa, inhabited primarily by Christians, allowed anyone to install a loudspeaker system throughout Washington Park over which any messages could be played. If a Christian church took up this fine offer and used its loudspeakers to broadcast sermons and gospel music all day long, could we really say that a reasonable observer wandering through the park should not believe that the City somehow endorses the message? At some point, as the Supreme Court recognized in *Widmar v. Vincent*, 454 U.S. 263, 275 (1981), a private religious group may so dominate a public forum that a formal policy of equal access degenerates into endorsement. Indeed, one can see how this hypothetical might violate the Establishment Clause even under the coercion test that the Supreme Court may adopt in *Lee v. Weisman*: surely the City cannot allow a religious group to turn a public park into an enormous outdoor church. *See Allegheny*, 492 U.S. at 661 (Kennedy, J., dissenting) ("Symbolic recognition or accommodation of religious faith may violate the [Establishment] Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.").

As an initial matter, the facts of this case may or may not make it an example of the sort of domination of a forum that constitutes a violation of the Establishment Clause. If the size, duration and regularity of the display do not constitute domination by themselves, the City's official expressions of approval may have contributed to an impression, at least on the behalf of some citizens, that Ottawa has purposefully given over a corner of Washington Park to Christianity. Like the majority, I do not reach these questions. But it is clear that some reasonable restrictions on the display of the pictures would help to dispel whatever effect of endorsement exists.

At oral argument, counsel for OFA conceded that Ottawa could impose reasonable, content-neutral restrictions on displays in Washington Park. Regulations on all private

displays might well help to dispel any impression that Ottawa is pleased to permit OFA to expropriate public space for its purposes. In this sense, the existence of regulations may be as important as their content. As to the content, the majority has suggested that the pictures be limited to the duration of Ottawa's own Festival of Lights. This seems reasonable, so long as the pictures are thought of as a Christmas display. But only cursory knowledge of Christian theology is required to know that these paintings would be as appropriate for Easter as for Christmas. OFA's right to pronounce its religious message should not depend on the season; a content-neutral regulation should treat the paintings as blank pages on which any message may be written. No private display should ordinarily be allowed to stand for more than a month or two per year. This approach would have the added advantage of avoiding any identification that may occur when an observer sees that Ottawa's and OFA's presentations go up and come down at the same time.

The problem with a content-neutral regulation of the sort I suggest is that it may be unnecessarily overbroad. There are any number of messages that private groups could deliver in Washington Park that Ottawa might be pleased to endorse. May Ottawa not permit a permanent exhibit in Washington Park that urges its citizens to protect bald eagles? The Constitution may forbid Ottawa to turn Washington Park into an outdoor church, but surely there is no constitutional restriction on turning it into a bird sanctuary.

Although there are Free Exercise and Free Speech concerns to be weighed in the balance, I believe that a regulation on displays may constitutionally be limited to religious displays. So long as there is an ample but reasonable opportunity for religious speech to take place, I see no reason why the government may not impose restrictions applying only to religious speech in order to avoid the appearance of endorsement.

This proposition follows from traditional Free Speech principles. Content-based regulations must be "necessary

to serve a compelling state interest and [ ] narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270 (citing *Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980)). But compliance with the Establishment Clause *is* a compelling state interest, *id.* at 271, and restrictions on religious displays need be no more onerous than the Establishment Clause requires. Indeed, the Supreme Court appears to have applied this principle in *Board of Education v. Mergens*, 496 U.S. 226 (1990). In that case, the Court upheld the constitutionality of a statute that requires secondary schools to give religious clubs the same access to school facilities that is provided to other student clubs. *Id.* at 252 (plurality opinion). According to six members of the Court, however, one of the saving graces of the statute was the restriction it places on official participation in these religious clubs. Unlike other student groups, religious groups may not have faculty advisors, nor may school staff participate in their meetings in other than a purely custodial role. *Id.* at 251 (plurality opinion)[1]; *id.* at 269-70 (Marshall, J., concurring). In short, somewhat unequal treatment for private religious speech may not only be constitutionally permissible, it may be constitutionally required. If Ottawa wants to be more flexible about the possible uses of Washington Park, the one or two month per year restriction might be limited to religious displays.[2]

The case must be remanded to the district court, and that court must devise an appropriate injunction. The ma-

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[1] The Court might have justified these restrictions by referring to the potential vulnerability of immature adolescents, but it did not. Instead, the plurality emphasized the maturity of secondary school students and their ability to distinguish government endorsement from mere accommodation of private speech. *Id.* at 250.

[2] I do not think that allowing Ottawa to distinguish between religious and secular speech fosters excessive entanglement with religion. Every Establishment Clause case requires a court to make the same distinction. To avoid litigation, governments must already decide what sorts of speech implicate Establishment Clause concerns.

jority has specified that the case be returned to another district judge on remand. But it is not surprising that Judge Shadur had such a strong reaction to this case. The record indicates that the original plaintiff in this case, Richard Rohrer, was, in effect, ridden out of town on a rail for daring to complain about the City's conduct. Affidavit of Richard Rohrer (June 2, 1989). The present plaintiff has concealed her identity to avoid suffering the same treatment. Motion to Add a Plaintiff and to Proceed Anonymously (June 27, 1989). However much some citizens of Ottawa may disagree with the position that the plaintiffs have taken, however much they may think the plaintiffs annoying and overlitigious, the conduct of some of them has been deplorable. This dispute has concerned the display of paintings from the life of Jesus of Nazareth, who counseled his followers: "But if any one strikes you on the right cheek, turn to him the other also; and if anyone would sue you and take your coat, let him have your cloak as well; and if any one forces you to go one mile, go with him two miles." Matthew 5:39-41 (Revised Standard Version, 2d ed., 1971). One would think that those who support this display would be capable of more charity.

FLAUM, *Circuit Judge*, with whom BAUER, *Chief Judge*, and CUMMINGS, WOOD, JR., and CUDAHY, *Circuit Judges*, join, concurring in the judgment. I agree with the majority that the district court's injunctive remedy is overbroad, and that a remand for a more tailored remedy is appropriate. Admittedly, this case comes to us in an unusual procedural posture: the City has not appealed, yet we are asked to "remedy the remedy" imposed for its Establishment Clause violation because the Ottawa Freedom Association (OFA), whose interests are affected, has intervened on appeal. The majority, to its credit, has avoided becoming mired in this procedural thicket, limiting its analysis to those issues pertinent to the OFA. In so doing, however, I fear that it may have cut away too cleanly from this dispute's historical backdrop.

As an initial matter, I must point out my concern with the majority's references to the City's "alleged" endorsement of the paintings. *See, e.g.*, slip op. at 12, 19, 20. We are not permitted to adopt this characterization; because the City did not appeal the district court's ruling that it had violated the Establishment Clause, we are required to treat the endorsement as a given, not an allegation. Although this point at first may seem incidental, it exemplifies my more fundamental disagreement with the majority's approach: While the majority reasons that it need "not address the issue of whether the City of Ottawa endorsed the Jaycees' religious speech" because the City has not appealed, slip op. at 12, in my view, our analysis cannot set aside the City's involvement with the display, for the finding of its history of endorsement bears on the determination of what, if any, restrictions the district court may place on the OFA's display of the paintings in Washington Park on remand.

As Justice O'Connor noted in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,

> the "history and ubiquity" of a practice is relevant not because it creates an "artificial exception" from

> [the endorsement] test. On the contrary, the "history and ubiquity" of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.

492 U.S. 573, 630 (1989) (concurring opinion). Although the First Amendment principles delineated by the majority are correct as a theoretical matter, they do not reach the practical issue of how to factor in the City's past actions. And because in the present case we cannot write on a clean slate, and must confront the City's impermissible endorsement as an unchallenged finding, we are required to evaluate the First Amendment principles and potential remedies with that endorsement in mind.

The dilemma facing the district court on remand, then, is how to remedy a government entity's Establishment Clause violation without unduly infringing upon the free speech rights of private parties. The school desegregation cases may be instructive in addressing the present implications of yesterday's endorsement, and in putting matters in a historical perspective. In *Board of Education of Oklahoma City v. Dowell*, 111 S. Ct. 630, 638 (1991), the Supreme Court explained that a State's dismantlement of a segregated public education system—that is, the achievement of a "unitary" system—is complete when the State terminates its policy of intentional discrimination, adopts race-neutral policies and practices, and eradicates, to the extent practicable, the vestiges of unlawful discrimination. More recently, in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), the Court recognized that this "unitariness" concept helps define the scope of the district courts' authority over school districts previously found to have engaged in unlawful segregation. *Id.* at 1443. A similar, albeit simplified, analysis might well be applied in fashioning a remedy for previous Establishment Clause violations.

As the majority correctly recognizes, a remedy "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Slip op. at 19 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984)). Put another way, "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). A remedy is justifiable "only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Freeman*, 112 S. Ct. at 1445. Here, the initial violation—as found by the district court—was the City's endorsement of a religious message. 726 F. Supp. at 725. Given this, the remedy—a broad injunction prohibiting "future display of the paintings in the Park by any group"—exceeded permissible bounds. By forbidding *all* future display of the paintings by *any* private party, the district court's attempt to address the City's violation regrettably implemented an inappropriate restriction of its own, censoring private religious speech in a public forum.

Borrowing from the approach used in the school desegregation context, the district court could benefit from considering such issues as whether the City had terminated its policy of endorsement, adopted equal access policies or taken steps to ensure equal access in practice, and eradicated, to the extent practicable, any "vestiges" of the past endorsement that might remain. *Cf. Dowell*, 111 S. Ct. at 638. Of concern, of course, is that the remedy seek to eliminate any remnants of past endorsement by the government. The district court should, therefore, attempt to determine what, if any, vestiges of the City's previous First Amendment violations remain today. Indeed, it may find no traces, and conclude accordingly that no remedy is warranted. This approach would address the City's constitutional violation while, at the same time, paying heed to the free speech rights of private parties. At root, it is a means of providing some contours within which the district court can shape an appropriate remedy.

It also is critical to recognize that the totality of past circumstances—rather than each of the City's individual acts—determines whether the previous endorsement endures to the present day. The majority notes that several members of this Court believe the City's resolution "too old to currently constitute an endorsement." Slip op. at 21 n.8. That may well be the case. But what must be considered is whether all of the City's actions, in their entirety, sufficiently impact present perceptions of the display so as to warrant remedial relief.

One example of how historical context can impact a remedial result is as follows. The district court, as Judge Cudahy's concurrence recognizes, sensed some sort of "symbiotic" relation between the City and the then-private party defendant, the Jaycees, *see* 726 F. Supp. at 717-18 n.14, although it made no such explicit finding. The absence of such a finding rendered the scope of the all-inclusive prohibition overbroad. However, a "symbiotic" relationship—in which a private speaker merely serves as a "stand-in" for the public entity—can conceivably exist. In such a scenario, a government entity's history of involvement, and its "artificial" transfer of the mode of expression to a private party, might provide adequate grounds for a ban, even in a public forum.

As one commentator has recognized, albeit in the public school context:

> "[I]dentifying who initiates religious speech may be relevant to determining the remedy. A sufficient remedy for noncoercive endorsement of student-initiated groups would be to enjoin further sponsorship. . . . But when the school creates the student organization in the first place, or coerces students to attend, the presumptive remedy would be to enjoin the sponsored organization from meeting, just as we decertify sweetheart unions with improper company sponsorship.

Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 53-54 (1986). In these cases, the line between public and private speech becomes murky, and the speech at issue is not altogether "private." Unfortunately, the majority's analysis does not permit such a possibility, even in the abstract, stating only the general rule that a difference exists "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Slip op. at 13 (quoting *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 250 (1990)) (emphasis in original). I suggest the majority's approach is too restrictive, and fails to allow for even the possibility of a mixed public/private message and messenger.

Similarly, the majority cites *Widmar v. Vincent*, 454 U.S. 263 (1981), for the proposition that the First Amendment prohibits the state from denying religious organizations equal access to facilities that are open to nonreligious groups, slip op. at 15, and states, "we fail to comprehend how the Establishment Clause could constitute a sufficiently compelling state interest to justify a content-based exclusion of private religious speech in a quintessential public forum." *Id.* Here, however, the district court found that the display had so dominated the open forum as to call into question whether access truly was "equal." *See* 726 F. Supp. at 724 ("[u]nlike *Widmar*, here there is unrefuted empirical evidence" that the religious display dominated the Park) (citing *Widmar*, 454 U.S. at 275). By framing the issue as it does, the majority avoids addressing this aspect of equal access analysis. *See also Mergens*, 110 S. Ct. at 2373 (Equal Access Act, facially and as applied to school, does not have primary effect of advancing religion, "[a]t least in the absence of empirical evidence that religious groups will dominate . . .") (quoting *Widmar*, 454 U.S. at 275). The majority likewise states that the issue is "[w]hether private persons may be enjoined from engaging in religious speech in a public forum

on the basis of the religious content of the speech." Slip op. at 12. It then embarks upon a lengthy and reasoned exposition of First Amendment public forum jurisprudence which, again, is fine in the abstract but is untethered to the historical context of this dispute—and therefore does not adequately guide our analysis of the remedial issue challenged by the OFA on appeal.

I do not question that religious speech, as an original matter, clearly is entitled to the same degree of First Amendment protection as private speech. Nor do I dispute that "the mere presence of religious symbols in a public forum does not violate the Establishment Clause." Slip op. at 17 (citing *Mergens*, 496 U.S. at 250). Our analysis, however, cannot rest solely on these broad general principles. We must acknowledge the district court's finding that the Establishment Clause was violated—even if we may individually disagree with that determination—and the fact that the City did not appeal that finding. In reviewing the overbroad nature of the injunctive remedy, this Court must at a minimum recognize the relevant historical context, in order to provide a framework within which the district court may construct an appropriate remedy.

EASTERBROOK, *Circuit Judge*, concurring. The first amendment, applied here via the fourteenth, establishes several fundamental rules, including:

> **Rule 1**: Government may not discriminate against private speech in a public forum on account of the speaker's views. The Free Exercise Clause assures speakers whose message is religious no less access to public forums than that afforded speakers whose message is secular or sacrilegious. *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Doe v. Village of Crestwood*, 917 F.2d 1476, 1478 (7th Cir. 1990).
>
> **Rule 2**: Government may not support a particular religious group or point of view. (Whether endorsement standing alone violates the Establishment Clause, or whether instead the Constitution proscribes only use of the power of government in support of religion, is before the Supreme Court in *Lee v. Weisman*, argued Nov. 6, 1991.)

The district court added:

> **Rule 3**: If the government violates Rule 2, it must violate Rule 1 as a cure.

I join the court's opinion, which holds that the Constitution neither creates nor tolerates Rule 3. It cannot be that private religious speech, if ever preferred by the government in violation of Rule 2, is thereafter proscribed in violation of Rule 1—that speech the government dislikes is untouchable, while the Constitution turns off all music to the mayor's ears. The Constitution insulates private speech from the government's druthers. Neither official disfavor nor the rebound effect of official approbation can make a difference when the Constitution puts choice in private hands. A blunder by public officials cannot restrict the scope of private speech.

This necessarily entails the conclusion that religious speech may not be excluded from public forums just

because passersby misunderstand the public role. See *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984) (private group may display crèche in public park although government could not put up an identical display), affirmed by an equally divided Court under the name *Scarsdale v. McCreary*, 471 U.S. 83 (1985); *Crestwood* (private group may sponsor a mass in a public park, though government may not); *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (same); *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973) (same). *Mergens*, *Widmar*, and *Fowler v. Rhode Island*, 345 U.S. 67 (1953), require no less. That a public forum may be close to city hall cannot matter; any forum open to secular speech must be open to religious speech. A government's obligation to dissipate any mistaken impression of sponsorship that it has induced is its *own* burden, and laxity in discharge of public duties is no justification for curtailing private speech.

Contrary views, expressed in cases such as *Americans United for Separation of Church and State v. Grand Rapids*, No. 90-2337 (6th Cir. Apr. 21, 1992); *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990); and *Kaplan v. Burlington*, 891 F.2d 1024 (2d Cir. 1989), create an obtuse observer's veto, parallel to a heckler's veto over unwelcome political speech. An obtuse observer will not appreciate that the Constitution requires the government to tolerate all kinds of speech in public places and so will infer that the government endorses what it does not forbid. Private errors do not justify public discrimination against speech. Otherwise some persons' failure to understand the meaning of the first amendment (that the government must remain neutral) would become an occasion for curtailing the scope of that amendment. Public belief that the government *is* partial would compel the government to *become* partial. The Free Exercise Clause offers special protection for religious speech. If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum.

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